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FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

Alfred C. Sikes, Chairman

James H. Quello

Sherrie P. Marshall

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH CO. — File No. CSG-90-073-P/L

Application for authority to construct and operate a transmit/receive earth station for the provision of international services.

ORDER AND AUTHORIZATION

Adopted: August 6, 1990; Released: August 13, 1990

By the Chief, International Facilities Division:

1. The above-captioned application filed on May 9, 1990, by the American Telephone & Telegraph Company (AT&T), requests authority pursuant to Title III of the Communications Act of 1934, as amended, and Section 201(c)(7) of the Communications Satellite Act of 1962, as amended, to construct and operate a transmit/receive earth station at Triunfo Pass, located in Malibu, California, for the provision of communications services between the United States and Pacific Ocean Region (POR) locations. The application was placed on public notice on June 20, 1990. No comments were received.

2. To construct the Triunfo Pass earth station, AT&T proposes to modify an existing 32-meter antenna which was previously licensed under domestic satellite earth station, Call Sign KB32, at the same location, to meet INTELSAT Revised Standard A technical parameters.[1] The proposed international earth station would operate with INTELSAT POR satellites in the 6/4 GHz bands. Currently, AT&T provides telecommunications services between the United States and various POR points through satellite and terrestrial facilities. AT&T states that due to limited transponder capacity on the INTELSAT Primary Path Satellite at 174 degrees East Longitude, there is an immediate need for AT&T to begin construction and testing of a second antenna.

3. AT&T's proposed modification of its existing antenna would consist of replacing components in the antenna feed system to change the antenna operation from linear to circular polarization. New low noise amplifiers would be installed and the existing ground communication electronics equipment would be replaced with equipment compatible with the INTELSAT satellite system.

4. In its Report and Order in the *Earth Station Ownership Proceeding*, CC Docket No. 82-540, the Commission established a more open and flexible earth station policy which allowed entities other than the Earth Station Ownership Committee (ESOC) to own and operate international earth stations that access the INTELSAT system. The Order permitted the joint carrier owners of ESOC earth stations to decide among themselves the future of ESOC.[2] The Commission also concluded that when reviewing applications for these international earth stations, it would distinguish between earth stations dedicated to providing IBS and/or television services and multipurpose stations. IBS and/or television earth stations, the Commission found, do not have the same potential for revenue diversion and significant impact on system efficiency as multipurpose earth stations. Consequently, the Commission concluded that it would consider only the minimal legal, financial and technical qualifications of the applicant as required by Sections 308 and 319 of the Communications Act of 1934, as amended, when reviewing applications for IBS and/or television earth stations. Absent special problems, the Commission stated that it would treat these applications as routine and process them expeditiously.

5. With respect to multipurpose stations, the Commission stated that it would continue close scrutiny of applications for construction and operation of these facilities since they tend to raise more complex economic, technical and operational issues that may affect the variety, quality and price of service offered to users. In determining whether the grant of an application for a multipurpose earth station will serve the public interest, the Commission indicated it would conduct an analysis by balancing the possible benefits (*e.g.*, shorter terrestrial hauls, increased user options, lower charges to users, and increased customer base for INTELSAT services) against the possible detriments (*e.g.*, reduced technical efficiency, harmful revenue diversion, service deterioration and higher charges to users) which a particular application may present.[3] However, with the dissolution of ESOC earth station ownership arrangements and the transition to a competitive environment, the issue of harmful revenue diversion from existing ESOC earth stations is no longer a concern.

6. Upon consideration of the application, we conclude that authorization of the requested services and facilities will serve the public interest. AT&T's legal, technical and financial qualifications to construct and operate the proposed international earth station are well-established.[4] The proposed earth station shall comply with INTELSAT performance criteria for Revised Standard A stations. AT&T has also completed the necessary frequency coordination. Further, we find that the proposed Triunfo Pass station would employ up-to-date technology, promising several benefits to consumers of AT&T's overseas service offerings. The use of such technology can be expected to improve the quality of international POR services provided by AT&T. The improved cost-efficiency of the equipment should result in lower charges to end users and an increased customer base for INTELSAT services. The use of improved technology may also make it possible for AT&T to increase the number of communications services that it provides in the POR.

7. We also find that the construction of the proposed multipurpose earth station will not adversly affect INTELSAT. By adding a second antenna to its location at Triunfo Pass, AT&T will be able to access an additional INTELSAT POR satellite and result in a greater retention of traffic by providing more effective competition to alternative transmission systems.[5]

8. IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of multipurpose satellite services by AT&T.

9. Accordingly, IT IS ORDERED, pursuant to Sections 214, 304, 309 and 319 of the Communications Act of 1934, 47 U.S.C. §§214, 304, 309 and 319 (1976), and Section 201(c) of the Communications Satellite Act of 1962, 47 U.S.C. §721(c) (1985), that application File No. CSG-90-073-P/L IS GRANTED, and AT&T is authorized to:

a. modify and operate the proposed 32-meter 6/4 GHz band earth station facilities at Triunfo Pass in Malibu, California, for the provision of all communications services AT&T is now, or may hereafter be, authorized to provide;[6]

b. utilize the proposed earth station facilities at Triunfo Pass in Malibu, California to provide AT&T's authorized services to the Pacific Ocean Region to such points served by INTELSAT Pacific Ocean Region satellites as AT&T is now, or may hereafter be, authorized to serve.

10. IT IS FURTHER ORDERED that before completion of equipment installation and facility activation, the applicant shall provide the Commission with a summary of equipment which was actually installed.

11. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] The existing domestic earth station at Triunfo Pass was acquired by AT&T from GTE Satellite Corporation on January 17, 1986. *See* Application for Consent to Assignment of Radio Station, Construction Permit or License, File Nos. 846-CF-ML-881 and 995-DSE-R-80.

[2] Earth Station Ownership, 100 FCC 2d 250 (1984).

[3] *Id.* at 284.

[4] American Telephone & Telegraph Co., (File No. CSG-86-062-P/L), Mimeo No. 6841 (released September 11, 1986); American Telephone & Telegraph Co., (File No. CSG-85-055-P/L), Mimeo No. 7135 (released September 19, 1985); American Telephone & Telegraph Co., et al., (File Nos. CSG-86-013-P/L and CSG-86-014-P/L), Mimeo No. 3327 (released March 25, 1986).

[5] This authorization is not to be construed as permitting the provision of any service between earth stations located within the United States.

[6] AT&T shall request authorization to acquire INTELSAT space segment from Comsat in accordance with the requirements of the Commission's International Competitive Carrier decision, International Carrier Policies, 102 FCC 2d 812 (1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
July 27, 1990

Released: August 13, 1990

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1925 K Street, N.W.
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In re: KIQI(AM)
San Francisco, CA
File Nos. BP-20398, BMP-811231AA,
BP-870330AP & BMP-881229AD

Dear Mr. Gammon:

This is in regard to the application for review filed by Oro Spanish Broadcasting, Inc. ("Oro") on May 26, 1988.

Oro is the licensee of KIQI(AM), San Francisco, CA. On April 24, 1980, Oro was granted a construction permit, to modify its then existing daytime-only facility; that permit expired on April 24, 1981 ("1980 construction permit"). Subsequently, on June 1, 1982, the staff granted an application to modify that permit to allow a change of city of license and relocation to Sunnyvale, CA, a decrease in daytime power from 50 kW to 25 kW, and the addition of nighttime power of 10 kW with an expiration date of June 1, 1983 ("Sunnyvale modification"). Thereafter, an extension request was granted and the modified permit was extended to December 15, 1983. Oro did not request further extension of that construction permit. Subsequently, in September 1985, pursuant to Show Cause Order in Docket No. 84-281, the Commission modified the licenses of Class II stations on Canadian clear channels, including KIQI, to expand hours of operation from daytime to unlimited time and to limit nighttime power to 500 W.

Thus matters stood until March 30, 1987 when Oro filed an application seeking modification of its licensed San Francisco facility through an increase of nighttime power to 2 kW by waiver of the 500 W restriction. This March 30, 1987 application noted, referring to Oro's Sunnyvale construction permit, that Oro "earlier held" a permit specifying a nighttime power level of 10 kW. Prior to acting upon Oro's March 30, 1987 application, the staff researched the status of Oro's Sunnyvale permit, found that it had expired and, by letter dated April 30, 1987, cancelled Oro's 1980 construction permit and the 1982 Sunnyvale modification pursuant to Section 73.3599 of the Commission's Rules, citing Oro's failure to file either an application for license to cover the construction or an application for extension of time to construct the permit at any time following the permit's expiration in December 1983. On May 19, 1987, Oro filed a "contingent petition for partial reconsideration" of that cancellation, asserting that Oro was unable to construct its Sunnyvale permit due to zoning problems and that its Sunnyvale permit should be reinstated to avoid the necessity of waiver since the staff had failed to "declare forfeited" Oro's Sunnyvale construction permit for three and one-half years subsequent to its 1983 expiration. Thus, Oro argued that the Sunnyvale construction permit remained in force until the staff's April 30, 1987 cancellation.

On October 16, 1987, the staff returned Oro's March 30, 1987 license modification application which specified a nighttime power of 2 kW as violative of Sections 73.21(a)(2)(iii) and 73.3571(d)(4), finding no basis for waiver of the 500 W restriction. On November 12, 1987, Oro filed a petition for reconsideration of the staff's October 16, 1987 action; Oro supplemented that petition on March 10, 1988 and December 29, 1988, which petition and supplements are currently pending.

On April 29, 1988, the staff, by letter, denied Oro's "contingent petition for partial reconsideration" finding that:

> Oro made no progress toward completing the changes authorized by the [1980] construction permit and [1982] modification, and the permit expired December 15, 1983. Subsequently, the permit and modification were formally cancelled pursuant to our letter of April 30, 1987. Further, your request that we defer cancellation and allow you to treat your pending application as a modification of that permit is meritless, as the permit has already been effectively cancelled and the Commission's rules do not provide for such procedural maneuvering.

On May 26, 1988, Oro filed this application for review. Oro argues that it was unable to construct the Sunnyvale construction permit, due to local citizen opposition and zoning problems. Oro then reiterates its argument that the Sunnyvale construction permit remained in effect because that permit had not been cancelled by the Commission. Oro contends that its March 30, 1987 application for a power increase for its licensed San Francisco facility should be treated as a modification to that Sunnyvale construction permit.

Though we do not take issue with Oro's contention that its Sunnyvale modification did not lapse until April 30, 1987, Oro's argument is unavailing. Oro's contingent petition for partial reconsideration failed to show how the staff erred in cancelling the Sunnyvale construction permit. Oro's Sunnyvale construction permit expired on December 15, 1983; Oro neither applied to extend the permit beyond that date nor sought the permit's reinstatement in the three and one-half years following its expiration. While Oro's contingent petition for partial reconsideration stated that large quantities of time and money were expended in an effort to obtain zoning and other local clearances necessary to construct the facilities authorized by the Sunnyvale construction permit, Oro's showing failed to present any new facts or changed circumstances warranting reconsideration of the staff's determination to cancel the permit. Hence, the staff was fully justified in both cancelling the Sunnyvale construction permit and denying Oro's contingent petition for partial reconsideration. Now Oro's application for review notes that "despite intense efforts to overcome [local] opposition, it proved impossible to obtain zoning for the Sunnyvale facilities." Oro's assertion of "impossibility" raised for the first time in its application for review is improper under 47 C.F.R. § 1.115(c) because it relies on questions

of fact or law upon which the designated authority has been afforded no opportunity to pass. However, even as an assertion of fact in support of an extension application it fails to demonstrate that Oro took all possible steps to resolve its problems and construct the permit. Thus, Oro's Sunnyvale permit was properly cancelled and no basis for its reinstatement has been shown.

Oro's attempt to circumvent the current 500 W limit on the nighttime power of KIQI by belatedly styling its March 30, 1987 application as a "modification" of its Sunnyvale construction permit must fail. The fact that Oro filed a modification application on March 30,1987 prior to the staff's cancellation of the Sunnyvale construction permit is irrelevant inasmuch as the application specifically sought to increase the nighttime power of the licensed facilities serving San Francisco. The application did not seek to modify the proposed Sunnyvale facilities nor did it propose to change the community of license on the construction permit.

Treating Oro's March 30, 1987 application as a request to modify its existing licensed facility, a waiver of the 500 W limit on the 1010 kHz frequency is necessary. However, Oro has failed to state an adequate basis for grant of such a waiver request. Oro's March 30, 1987 application requested a waiver of the 500 W limit so that KIQI(AM) could provide "for extension of service to 100% of the principal city to be served by the station" and argued that "no constraint on future development of new or higher power stations on the channel in the United States" would result. The staff's letter of October 16, 1987 returning that application noted that the nighttime operation on KIQI(AM) was initiated by Show Cause Order under Docket No. 84-281, a Rule Making instrument which created what were previously unpermitted operations on foreign clear channels and which imposed no coverage requirements on KIQI(AM). In view of this, the staff concluded that no affirmative basis for waiver existed, and returned the application as unacceptable for filing.

Oro's petition for reconsideration fails to demonstrate how the staff erred in denying its waiver request. The petition for reconsideration asserts that the staff erred in failing to take into account the effect of Oro's Sunnyvale construction permit on Oro's waiver request. However, the fact that Oro at one time held a construction permit specifying a nighttime power level of 10 kW in Sunnyvale does not obligate the staff to waive the 500 W limit in San Francisco which was subsequently imposed on the 1010 kHz frequency -- especially where the Sunnyvale permit expired three and one-half years before and was properly cancelled by the Commission. Other than reiterating its assertions that the March 30, 1987 application had no preclusive effect and stating that its waiver was consistent with Commission policy favoring a strengthened AM band, Oro's petition for reconsideration provides no basis for overturning the staff's denial of its waiver request.

Apart from the issues discussed, *supra*, it should be noted that the March 30, 1987 application is otherwise unacceptable as specifying a nighttime power level of 2000 watts since the KIQI(AM) transmitter site is located within the nighttime 2 mV/m contour of KKIS(AM) (effective February 17, 1990, the call letters of KKIS will be changed to KIXA) and any increase in power or signal intensity would only aggravate the existing overlapping of signals generally prohibited by Section 73.37(a) of the Commission's Rules. *See Midwest Television, Inc.*, 2 FCC Rcd 215 (1987). That is, the proposal to increase power at the presently licensed site is unacceptable whether it is viewed as an application to modify the licensed facilities or as an application to modify the Sunnyvale construction permit.

In light of the above, Oro Spanish Broadcasting Inc.'s application for review IS DENIED. Furthermore, Oro Spanish Broadcasting Inc.'s petition for reconsideration filed on November 12, 1987, as supplemented on March 10, 1988 and December 29, 1988 (BMP-881229AD) IS DENIED.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re Application of

MARY R. KUPRIS, EXECUTRIX OF THE
ESTATE OF ANTHONY C. KUPRIS
(Assignor)

and File No. BALCT-890511KF

WLOS TV, INC.
(Assignee)

For Assignment of License for
Station WAXA-TV, Channel 40,
Anderson, South Carolina

MEMORANDUM OPINION AND ORDER

Adopted: July 25, 1990; Released: August 13, 1990

By the Commission: Commissioner Quello concurring in the result; Commissioner Duggan dissenting in part, concurring in part, and issuing a statement.

1. In the application set out in the caption, WLOS TV, Inc., sought to acquire station WAXA-TV and to operate it primarily as a satellite, pursuant to Note 5 to 47 C.F.R. §73.3555. In *Mary R. Kupris*, 67 R.R.2d 849 (1990), we found that the applicants had failed to establish that operation of station WAXA-TV as a satellite would be consistent with the public interest and denied the application. We consider here the applicants' motion to accept a late-filed petition for reconsideration of that action.

2. The applicants tendered their petition and accompanying motion one day late. They attribute the tardiness to "computer error." Except where the Commission fails to provide notice of its decisions to parties, as required by our Rules, we lack the authority to extend or waive the 30-day period specified in section 405 of the Communications Act of 1934, as amended, 47 U.S.C. §405. *See, e.g., Reuters Ltd. v. FCC*, 781 F.2d 946, 951-52 (D.C. Cir. 1986); *Gardner v. FCC*, 530 F.2d 1086 (D.C. Cir. 1976); *Richardson Independent School District*, 5 F.C.C. Rcd. 3135 (1990). Because the Commission did provide actual notice to the applicants here, we lack authority to waive the 30-day period for filing petitions for reconsideration in section 405 and, accordingly, decline to do so.[1]

3. The applicants state that despite the computer error, their courier arrived at the Commission at 5:33 p.m., only three minutes after the 5:30 official close of business.[2] We decline to waive the 5:30 requirement set out in the rule. There are many areas where applications and pleadings must be filed by the close of business on a specified date. Although we understand that difficulties are sometimes encountered by parties trying to meet those deadlines, a strict policy as to the official close of business avoids confusion, establishes consistency and treats fairly all parties that are similarly situated. A waiver of the 5:30 filing deadline would, in this case, run counter to all those factors. In other areas, we have expressly set out a strict policy on filing deadlines[3] and believe that no basis exists for permitting an exception in this case.

4. Nonetheless, we are aware that the applicants have filed a notice of appeal of our decision with the court. *WLOS TV, Inc. v. FCC*, No. 90-125 (D.C. Cir., filed May 14, 1990). We have exercised our discretion to review the record (including the petition for reconsideration) in light of our precedent to determine whether it would be appropriate to seek a voluntary remand of the case from the court. Upon that review, we have determined that there is no basis for seeking such a remand. We would not have granted this application even if our decision had not sought to reemphasize the basic principles which underlie the satellite exception to our contour overlap or "duopoly" rule.[4]

5. Under our prior precedent, as our decision suggested, we would not authorize the extreme degree of parent/satellite contour overlap the applicants proposed in this case. The overlap area between the parent and the proposed satellite, WAXA-TV, represented 73 percent of the area and 88 percent of the population within WAXA-TV's predicted Grade B contour. The applicants asserted that the extent of the overlap would be reduced to 52 percent of the area and 54 percent of the population if shadowing is taken into account, although a petitioner challenged the extent of the claimed loss of service due to shadowing. Regardless of which figures are used, a troublesome degree of overlap would exist.

6. The applicants assert that the extent of the overlap in this case falls within the range that has been approved in other satellite cases. They cite two cases in support of that position, *B. G. S. Broadcasting, Inc.*, 2 F.C.C. Rcd. 107 (1987) and *Suburban Broadcasting Corp.*, 83 F.C.C.2d 359 (1980), but a review of those cases does not support the applicants' position. In *B. G. S.*, the overlap represented 41 percent of the proposed satellite's Grade B coverage area, which is substantially less than the 73 percent predicted overlap and still considerably less than the claimed 52 percent overlap alleged by the applicants. The decision in *Suburban* stated that the overlap area between the parent and satellite was 681 square miles, but did not state what percentage of the total that figure represented. The applicants here have not provided such a figure, but our review of our files for the then-authorized facilities in *Suburban* indicates that the 681 square mile area represented less than 32 percent of the total and is, therefore, considerably less than the extent of overlap proposed for station WAXA-TV. In short, a grant of the WAXA-TV application would have resulted in a parent/satellite contour overlap that would have substantially exceeded the range of overlap previously found acceptable. It is axiomatic that the greater the degree of overlap, the heavier the burden on an applicant seeking a satellite exception. The applicants failed to meet that burden in this case.

7. Finally, we note that the applicants' proposed operation would not further our longstanding goal of providing service to unserved or underserved areas. In that connection, we note that Anderson is within the predicted Grade B contour of six commercial television stations.[5] Accordingly, we do not find it necessary to seek a voluntary remand of the case from the court.

8. In view of the above, IT IS ORDERED, That the Motion to Accept Late-Filed Pleading IS DENIED, and the late-filed Petition for Reconsideration IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The applicants cite three cases where "equitable considerations" resulted in grant of requests for waiver of section 1.106 of our Rules, which implements section 405 of the Act, and acceptance of late-filed petitions for reconsideration. *A T & T Co.*, 95 F.C.C.2d 167 (1983); *KND Corp.*, 83 F.C.C.2d 161 (1980); *RKO General, Inc.*, 28 F.C.C.2d 683 (1971). These cases failed to consider our statutory obligation under section 405. Moreover, except in *Gardner* situations, we note that case law has consistently held that we lack the authority to waive the statutory filing requirements. *See, e.g., Reuters Ltd. v. FCC*, 781 F.2d 946 (D.C. Cir. 1986).

[2] 47 C.F.R. §0.403.

[3] *Waivers of Application Filing Deadlines*, 58 R.R.2d 1706 (1984). We stated there:

> The Commission will consider clearly unforeseeable circumstances as grounds for waiver -- such as a debilitating earthquake or a city-wide power outage which brings transportation to a halt. The Commission will no longer consider as unusual or compelling, however, requests for waiver based upon claims that copying machines, delivery services or even, in most cases, inclement weather or illness, was responsible for the tardy filing. Although these circumstances may be unexpected, they are reasonably foreseeable and therefore applicants should allow enough time to meet cut-off deadlines to account for such unanticipated delays. In other words, . . . applicants who wait until the eleventh hour to meet Commission deadlines will be held to assume the risk for almost all events which may occur to prevent timely filing. *Id.* at 1707. The thoughts expressed there are applicable to this case.

[4] The duopoly rule is contained in section 73.3555 of our Rules, and the satellite exception is set out in Note 5 to that rule.

[5] The applicants assert that Anderson receives five off-the-air Grade B or better signals. However, the engineering affidavit submitted by the applicants does not support their position. The affidavit confirms that the one station in question, WNEG-TV, does provide Grade B service to Anderson, although the affiant opines that reception is "unlikely" due to receiving antenna orientation. Nevertheless, even if Anderson did receive five rather than six off-the-air Grade B or better signals, we would not consider it underserved.

STATEMENT OF COMMISSIONER ERVIN S. DUGGAN

Concurring in Part, Dissenting in Part

In Re: Application of Mary R. Kupris and WLOS(TV), Inc.

Several months ago I joined my fellow Commissioners in voting to deny the application for the assignment of station WAXA-TV, Anderson, S.C., to WLOS(TV), Asheville, N.C. *In re Mary R. Kupris*, 67 R.R.2d 849 (1990). In a separate statement, however, I expressed serious reservations about the denial, and regret about its probable result: that the only television station licensed to Anderson would be left dark.[1] Upon reflection I am now convinced, especially in light of new evidence brought to the Commission's attention, that the original decision was in error and should be reversed.

On procedural grounds, I am compelled to concur with my fellow Commissioners on the applicants' motion that the Commission accept a late-filed petition for reconsideration of the Commission's earlier decision. The Commission apparently lacks authority, under existing precedent, to waive the 30-day period specified in section 405 of the Communications Act of 1934 for filing petitions for reconsideration. *See Reuters Ltd. v. FCC*, 781 F.2d 946, 951-52 (D.C. Cir. 1986). Even though our hands may be tied, however, I am sympathetic to the fact that the applicants suffered a sudden computer failure, causing their courier to arrive at the Commission a mere three minutes after the deadline. This computer failure may not be enough to justify a waiver of the 30-day rule for "extraordinary circumstances," but clearly it was an unforeseen and debilitating event. The Commission's necessarily strict application of procedural rules, with little or no room to consider extenuating or mitigating individual circumstances, seems to me a cold triumph of legalism that ignores substantive justice.

The late-filing issue aside, I dissent from the remainder of this decision. In particular, I believe that the Commission should seek a voluntary remand of the case from the U.S. Court of Appeals for the D.C. Circuit, where it is now pending, for the following reasons:

First, the initial WAXA-TV decision amounted to a basic and fundamental shift in the Commission's satellite policy, despite the fact that a Rule Making on these issues was pending.[2] The purpose of the Rule Making was to examine the Commission's policy regarding satellite waiver requests; it proposed to tighten this policy by prohibiting satellites in major markets. In spite of this, however, the Commission in the WAXA-TV decision chose suddenly to change its long-standing case-by-case satellite waiver policy by changing the weight accorded certain factors. In effect, the Commission tightened its waiver policy by announcing that it would focus almost entirely on whether the television market in question was underserved and the extent of parent/satellite overlap. [3] By so doing, the Commission in effect preempted its own pending Rule Making, which had proposed to prohibit satellite stations in larger urban markets.

What was the Commission's stated rationale for changing course in mid-stream rather than waiting to conclude its pending proceeding? That "the case raises some very

basic questions about our satellite policies that cannot be put off, consistent with our public interest obligations, until the completion of the Rule Making proceeding." 67 R.R.2d at 853. The stated urgency was solely rhetorical; no facts whatever were provided to support the claim that the Commission must act so precipitously.

In fact, Rule Makings are designed precisely to answer "basic questions" -- and to answer them not in *ad hoc* fashion, but carefully and deliberately. The Commission should have awaited the completion of its Rule Making on satellites rather than leaping hastily to a conclusion, and an obvious policy shift, in this case.

In sum, the Commission decided to apply a decidedly new method of analysis in a single adjudicatory proceeding -- and this despite a pending Rule Making on the same general issues. Pending applicants were not put on notice that such a shift in policy might occur outside the Rule Making. And to make matters worse, the applicants in the WAXA-TV case were reportedly led, by the Commission staff, to believe that their application would be approved -- a costly incident of misplaced faith. The Commission may not have technically violated the Administrative Procedure Act by its action in this regard, but it seems to me to have violated the spirit of that law.

Second, I question the merits of the fundamental policy change adopted so suddenly by the Commission in its WAXA-TV decision. Under long-standing satellite policy, the Commission weighed a diversity of factors, including the degree of overlap between the parent and proposed satellite; the size of the market; the financial losses and condition of the stations involved; unsuccessful efforts to sell a license or permit to a buyer that would operate the station as a full-service station; the economic inability of the local community to support a full-service station; the number of services in the overlap area; and the extent to which the satellite would provide service (including first network service) to underserved areas.[4]

Under the Commission's newly hatched satellite waiver policy announced in the WAXA-TV decision, however, the Commission stated that it will focus on only two elements: (1) providing service to unserved or underserved areas, and (2) the original purposes of the multiple ownership rules, which are to promote efficient spectrum use, programming diversity and robust economic competition. According to the Commission, "[i]n evaluating satellite requests, and pending completion of the Rule Making proceeding, we shall focus on the balance of these competing concerns." Other factors that had been considered in the past under the case-by-case approach "will continue to be weighed in the balance," the Commission announced -- but will be afforded "significantly less importance." 67 R.R.2d at 853.

I am not convinced that there are any problems with the case-by-case approach, although I am not opposed to compiling and evaluating comments on this approach in the context of a Rule Making proceeding. In the absence of a full-fledged review of our satellite waiver policy, however, the case-by-case approach seems to me perfectly appropriate. It allows the Commission maximum flexibility to assess the public interest implications and unique circumstances of individual cases. Indeed, for waivers of the radio-TV cross-ownership rule, the Commission recently adopted a new, more permissive policy, featuring a number of factors to be considered on a case-by-case basis, including the financial distress of the stations involved![5] I find it inappropriate, therefore, and more than a bit inconsistent with our policies on other multiple ownership rules, to apply a rigid formula in these cases -- focusing on only the degree of overlap or the number of stations serving the market. This narrower, more rigid approach fails, in my judgment, to take into account legitimate public interest factors.

Third, the Commission states in this order that, under our prior precedent, the Commission would never have authorized the extreme degree of parent/satellite contour overlap the applicants proposed in this case. This seems to me the purest speculation. Who can say what might have been? (It is also sadly unconvincing, in view of the fact that the Commission's Mass Media Bureau originally recommended approval.) In my view, this case falls comfortably within the range of existing satellite precedent. The overlap in this case was greater, to be sure, than in previous cases in which the Commission has granted waivers. But the Commission never stated in the past that any specific degree of overlap was "too large."[6]

Meanwhile, if we look beyond the overlap issue, the unique facts of this case and the public interest benefits it promises clearly weigh in favor of a grant. While the city of Anderson is part of the 36th largest market, it is a small community with only one local TV station -- WAXA-TV. In 1982 when WAXA-TV was acquired, the station was dark; it remained so for another two years before it resumed broadcasting in 1984. From 1984 to spring 1990, WAXA-TV accumulated operating losses of $4,727,804. Its monthly operating expenses exceeded revenues by thousands of dollars, resulting in a total cumulative loss of approximately $11 million --a loss incurred even though the owners made heroic efforts to cut expenses by reducing staff to a minimum and broadcasting 90% barter programming. Meanwhile, WAXA-TV was offered for sale as a stand-alone station through two separate brokers. There were at least 66 prospective buyers; none, in the end, proved interested in buying WAXA-TV as a stand-alone. All these factors were highly relevant criteria under the Commission's prior policy. *Such conditions, in fact, had been sufficient, in case after case, to justify the granting of waivers.* And indeed, as I have noted, the FCC's Mass Media Bureau recommended, in its original draft order, that the Commission grant the waiver.[7]

But it was not to be. After serious delays -- delays of months, in which the station's hemorrhage of losses continued -- and with a sudden decision to apply stricter waiver standards, a second set of findings and recommendations was produced. The consequences, we know now, have been disastrous -- for WAXA-TV, for its owners, and for the citizens of Anderson.

Thus it appears that station WAXA-TV, which has recently ceased operation again, is likely to remain dark unless eventually approved for satellite operation. It seems clear, given the size of Anderson, given the documented losses experienced by WAXA-TV, and given the scarcity of interested buyers, that this small community cannot support a full-service, stand-alone station. Operating WAXA-TV as a satellite of WLOS(TV), though, is the only course that appears likely to save the station. And this course promises several benefits which seem to me clearly in the public interest: improved coverage for WLOS(TV), for example, and access to ABC television network programming to more than 19,000 citizens for whom that major network is not now available. Under the Commission's previous policy, a station threatened with extinction was customarily granted a waiver to operate as

a satellite, even in cases where there would be considerable service area overlap, if it could be shown that there would be increased service to the public and no loss in diversity. *Suburban Broadcasting Corporation*, 83 FCC 2d 359, 365 (1980). I see no reason to alter that policy in this case, despite the Commission's sudden notion that overlap and market size should be our chief concerns.

Fourth and finally, the situation surrounding this case has changed materially since the Commission first addressed the issue. Consider these facts:

* All opposition to the satellite waiver application has been removed. Pegasus Broadcasting of Augusta, Georgia, Inc., once an opponent, no longer challenges the waiver application as it did when this case was first before us.

* Another competitor, moreover -- Pappas Telecasting, licensee of WHNS(TV) in Asheville, N.C. -- has submitted an affidavit and pleading *in support of* the applicants' reconsideration motion.

* Although the city of Anderson is part of the 36th largest market, this market is an artificial one containing portions of three states, with three major communities (Greenville and Spartanburg, S.C. and Asheville, N.C.) that actually function independently. In particular, Asheville and the South Carolina cities are geographically separated by mountain barriers and have separate local identities.

* An engineering statement submitted by the applicants indicates that one of the seven stations licensed to the ADI market (WNEG-TV, Toccoa, Georgia) cannot be received in Anderson or most of the ADI market.[8]

* The people of Anderson, the applicants now make clear, have access to only five commercial TV signals -- NBC, CBS, ABC, Fox, and a religious station -- not one of which provides local service meeting the special needs and interests of Anderson.

* Only one new prospective buyer has contacted the broker since the Commission's earlier WAXA-TV decision -- a buyer interested not in operating the station, but only in buying its now-unused equipment.

* The applicants have met with a number of community leaders in Anderson and report that the citizens there have "a desperate need for local self-expression."[9]

In light of all these facts, I cannot escape the conclusion that the Commission's death sentence upon WAXA-TV is harsh and unnecessary.

In sum, the applicants have, in my judgment, shown clearly and convincingly that Anderson is precisely the kind of community in which a satellite operation would serve the public interest. Granting this waiver request would preserve Anderson's only local TV station and allow local programming to resume: local news and other services designed to serve Anderson's special needs and interests. Considering that Anderson is part of a unique market, that WAXA-TV has sustained significant operating losses, that WAXA-TV has failed to operate profitably as an independent UHF station, and that the applicant was the lone party interested in buying the station, I am convinced that continued refusal to grant relief amounts to a serious error: an error that richly deserves to be reversed.

FOOTNOTES FOR STATEMENT

[1] I also noted that the present owners of WAXA-TV invested heavily and took earnest cost-cutting measures to keep the station operating after acquiring it in 1982, but that the station continued to operate at a loss. After several unsuccessful efforts to sell the station as a stand-alone, the owners turned to a prospective buyer interested in operating it as a satellite. 67 R.R.2d at 854.

[2] In 1987, the Commission issued a *Notice of Inquiry and Notice of Proposed Rule Making in Television Satellite Stations*, 2 FCC Rcd 1359 (1987), to reexamine its satellite policy in view of the growth in the number of TV stations, translators, low power TV stations, and cable systems. The *Notice* focused on two proposals -- (1) prohibiting TV satellites in larger urban markets, and (2) removing unnecessary restraints on satellites' locally originated programming to allow maximum licensee discretion.

[3] The Commission stated that "[a]s an interim measure, we believe we should refocus our inquiry on two elements when acting on requests for satellite status. First, we believe that we should not lose sight of the limited basis for creating the satellite exception in the first instance; that is, to provide service to unserved or underserved areas. Second, the multiple-ownership rules promote efficient spectrum use, and the policies of programming diversity and economic competion . . . . These policies should not be avoided by liberal grants of satellite exceptions. Thus, while gains to unserved or underserved areas will be considered, they must be weighed against the principles the rules are designed to protect. In evaluating satellite requests, and pending completion of the Rule Making proceeding, we shall focus on the balance of these competing concerns." 67 R.R.2d at 853.

[4] *See, e.g., Pete J. Stathakas*, 59 R.R.2d 169 (1985), *recon. denied*, 60 R.R.2d 1293 (1986); *Voice of the Caverns, Inc.*, 4 FCC 2d 946 (1966); *Frontier Broadcasting Co.*, 5 FCC 2d 317 (1966); *Meyer Broadcasting Co.*, 67 FCC 2d 593 (1978), *aff'd sub nom. Dickinson Broadcasting Corp. v.* FCC, 593 F.2d 1370, 1371 (D.C. Cir. 1979) *(mem.); MCC Communications*, 4 FCC Rcd 2079 (1989).

[5] *Amendment of Section 73.3555*, 4 FCC Rcd 1741 (1989), *reconsidered in part*, 66 R.R.2d 1115 (1989).

[6] Indeed, the Commission has granted satellite waivers in other cases where there was substantial overlap. *See B.G.S. Broadcasting, Inc.*, 2 FCC Rcd 107 (1987); *Suburban Broadcasting Corp*, 83 F.C.C. 2d 359 (1980).

[7] This earlier draft was inadvertently released by the Commission. *See Memorandum Opinion and Order*, FCC 90-110 (released April 11, 1990).

[8] *See* Engineering Statement of Neil Smith, Exhibit K, Petition for Reconsideration filed by Hogan & Hartson, May 14, 1990.

[9] *See* Petition for Reconsideration at 20.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-346

In re Applications of

PATRICK H. ROBINSON (hereafter "Robinson")	File No. BPH-880520MD
CHARLES G. MORGAN (hereafter "Morgan")	File No. BPH-880601MW
287 MONROE COMMUNICATIONS, INC. (hereafter "287 Monroe")	File No. BPH-880602MZ
JOBE BROADCASTING GROUP LIMITED PARTNERSHIP (hereafter "Jobe")	File No. BPH-880602NI
CHOCTAW BROADCASTING CORPORATION (hereafter "Choctaw")	File No. BPH-880602NN
MONROE COMMUNICATIONS, LTD. (hereafter "MCL")	File No. BPH-880602NZ
CHICAGO BROADCASTING, INC. (hereafter "Chicago")	File No. BPH-880602OB
ALLEN WILLIAMS dba CB BROADCASTING CO. (hereafter "Williams")	File No. BPH-880602OD
SEAB COMMUNICATIONS, INC. (hereafter "SEAB")	File No. BPH-880602OM

For Construction Permit
for a New FM Station
in Monroe, Louisiana
Channel 287C2 (105.3 MHz)

HEARING DESIGNATION ORDER

Adopted: July 24, 1990; Released: August 13, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Robinson.* Robinson proposes to locate his antenna on the existing tower of Station KARD(TV). The KARD(TV) facility is licensed at coordinates 32 degrees-30 minutes-21 seconds North Latitude, 92 degrees-08 minutes-54 seconds West Longitude. A discrepancy exists between the coordinates supplied by Robinson (32 degrees-30 minutes-*20* seconds North Latitude, 92 degrees-08 minutes-54 seconds West Longitude) and those in our Antenna Survey Branch. Inasmuch as Robinson references an existing licensed broadcast tower, official notice may be taken of data in the Commission's files. *See PN Radio Company*, 2 FCC Rcd 5540, 5543 (M.M. Bur. 1987). Consequently, the discrepancy does not rise to the level of a tenderability or acceptability defect. Nevertheless, Robinson will have to submit a clarifying amendment to the presiding Administrative Law Judge within 30 days of the release of this Order. Further, Robinson shall notify Station KARD(TV) of the discrepancy in order that the licensee may correct data on file with the Commission, if necessary.

3. *Jobe.* Kriss Fairbairn, the sole general partner of Jobe, is presently an employee of Station KTVE(TV), El Dorado, Arkansas. As El Dorado, Arkansas, and Monroe, Louisiana, are both located in the same market (ADI 116), a potential cross-interest problem could exist. Ms. Fairbairn has indicated her intent to terminate her relationship with KTVE(TV) in the event of grant of the referenced application. Accordingly, in the event of grant of Jobe's application, Ms. Fairbairn will be required to sever all connections with KTVE(TV) prior to the commencement of program test authority.

4. *Chicago.* The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Chicago has filed such statement, it is deficient. There are no recruitment organizations for women listed. Accordingly, Chicago will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

5. *Other Matters.* Since a determination has been received from the Federal Aviation Administration that the antenna proposed by SEAB would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and some other applicants have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by 287 Monroe, Jobe, MCL, Chicago, and Williams would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

6. Jobe petitioned for leave to amend its application on October 19, 1988; Choctaw petitioned for leave to amend its application on February 5, 1990. Both amendments were filed after September 8, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

7. Data submitted by the applicants indicate there would be significant difference in the size populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower heights and locations proposed by 287 Monroe, Jobe, MCL, Chicago, Williams, and SEAB would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That, within 30 days of the release of this Order, Robinson shall submit the clarifying amendment specified in paragraph 2 hereinabove to the presiding Administrative Law Judge and, if appropriate, notify Station KARD(TV) of the discrepancy between the coordinates of his proposed facilities and the coordinates for KARD(TV) on file with the Commission.

11. IT IS FURTHER ORDERED, That, in the event of grant of Jobe's application, Kriss Fairbairn will be ordered to divest herself of all interests in and sever all connections with Station KTVE(TV), El Dorado, Arkansas, prior to the commencement of program test authority.

12. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Chicago shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

13. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

14. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Jobe and Choctaw ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

15. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

16. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

17. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-410

In the Matter of

Amendment of Section 73.202(b), RM-6828
Table of Allotments,
FM Broadcast Stations.
(Ferriday, Louisiana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 26, 1990; Released: August 14, 1990

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 4 FCC Rcd 6989 (1989) issued in response to a petition for rule making filed by Tom Gay d/b/a The Radio Group (petitioner), licensee of Station KFNV-FM, Channel 296A at Ferriday, Louisiana, proposing the substitution of Channel 296C3 for Channel 296A at Ferriday, and the modification of the license of Station KFNV-FM to specify operation on the higher class co-channel. Petitioner filed supporting comments restating its intention to apply for the channel, if allotted.

2. We believe the public interest would be served by substituting Channel 296C3 for Channel 296A at Ferriday, Louisiana, providing that community with its first wide coverage area FM service. Channel 296C3 can be allotted to Ferriday in compliance with the Commission's minimum distance separation requirements at the petitioner's specified site, which is 12.4 kilometers (7.7 miles) east of the city.[1]

3. As requested, we are modifying the license of Station KFNV-FM to specify operation on Channel 296C3 in accordance with Section 1.420(g) of the Commission's Rules.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 27, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Ferriday, Louisiana	296C3

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KFNV-FM, IS MODIFIED, to specify operation on Channel 296C3 in lieu of Channel 296A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 296C3 at Ferriday, Louisiana, are 31-40-00 and 91-26-00. Because this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, the licensee may avail itself of the provisions of Section 73.213(c)(1) of the Commission's rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-431

In the Matter of

Amendment of Section 73.202(b), RM-6817
Table of Allotments,
FM Broadcast Stations.
(Alamo, Tennessee)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 26, 1990; Released: August 14, 1990

By the Deputy Chief, Policy and Rules Division:

1. At the request of Charles C. Allen (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 7133 (1989), proposing the substitution of Channel 226C3 for Channel 226A at Alamo, Tennessee, and the modification of its license for Station WNBE(FM) to specify operation on the higher class cochannel. Petitioner filed comments reiterating his intention to apply for Channel 226C3, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 226C3 for Channel 226A at Alamo, since it could enable WNBE to expand its coverage area. As proposed, we will also modify petitioner's license for Station WNBE to specify operation on Channel 226C3. Channel 226C3 can be allotted to Alamo in compliance with the Commission's minimum distance separation requirements at Station WNBE(FM)'s current transmitter site.[1]

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 27, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Alamo, Tennessee	226C3

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WNBE, IS MODIFIED, to specify operation on Channel 226C3 in lieu of Channel 226A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The transmitter site is located 8.6 kilometers (5.4 miles) southeast of the city. The coordinates are 35-43-31 and 89-03-25.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-430

In the Matter of

Amendment of Section 73.202(b), RM-6778
Table of Allotments,
FM Broadcast Stations.
(Lost Creek, West Virginia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 26, 1990; Released: August 14, 1990

By the Chief, Allocations Branch:

1. Pursuant to the request of William and Patricia Allman d/b/a AEL Broadcasting of West Virginia (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 7131 (1989), proposing the allotment of Channel 242A to Lost Creek, West Virginia, as that community's first local FM service.[1] Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 242A to Lost Creek, West Virginia, as that community's first local FM service. The channel allotment can be made in compliance with the Commission's minimum distance separation requirements.[2]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 27, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Lost Creek, West Virginia	242A

4. The window period for filing applications will open on **September 28, 1990,** and close on **October 29, 1990.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The *Notice* stated that this proposal is located within the protected areas of the National Radio Astronomy Observatory "Quiet Zone" at Green Bank, West Virginia, and that petitioner and other interested parties will be required to comply with the notification requirement of Section 73.1030(a) of the Commission's Rules. Petitioner states that it has taken the necessary steps to insure coordination with the National Radio Astronomy Observatory.

[2] The coordinates for Channel 242A at Lost Creek, West Virginia, are 39-09-36 and 80-21-06.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-366

In the Matter of

Amendment of Section 73.202(b), RM-7221
Table of Allotments,
FM Broadcast Stations.
(Lynchburg, Virginia)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 31, 1990; Released: August 14, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration a petition for rule making filed by Lynchburg Independent Broadcasters, Inc. (petitioner), licensee of Station WKZZ(FM), Lynchburg, Virginia, seeking the substitution of Channel 261C3 for Channel 261A at Lynchburg, and the modification of its license to specify operation on the higher powered channel.[1] Petitioner expresses its interest in applying for the channel, if allotted.

2. Channel 261C3 can be substituted for Channel 261A at Lynchburg in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.9 kilometers (4.3 miles) northeast of the city,[2] in order to avoid short-spacings to Station WANV-FM, Channel 259B, Staunton, Virginia, Station WZBB(FM), Channel 260A, Rocky Mountain, Virginia, and Station WWWB(FM), Channel 262C, High Point, North Carolina.

3. As requested, we shall propose to modify the license for Station WKZZ(FM) at Lynchburg to specify operation on Channel 261C3. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest or require that the petitioner demonstrate the availability of an additional equivalent channel at Lynchburg.

4. We believe the public interest would be served by proposing the substitution of Channel 261C3 for Channel 261A at Lynchburg since it could enable Station WKZZ(FM) to expand its coverage area. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, as follows:

	Channel No.	
City	Present	Proposed
Lynchburg, Virginia	252A, 261A 269A, 290A	250C3, 261C3, 269C3,[3] 290A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **October 4, 1990,** and reply comments on or before **October 19, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Jeffrey W. Malickson
P.O. Box 32488
Charlotte, North Carolina 28232
(Counsel for the petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Andrew J. Rhodes, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The petitioner is also the licensee of Station WWOD(AM), Lynchburg, Virginia.

[2] The coordinates for Channel 261C3 at the restricted site are 37-28-00 and 79-06-00.

[3] In MM Docket No. 89-464, the Commission has proposed to substitute Channel 269C3 for Channel 269A at Lynchburg, Virginia, and to modify the license for Station WXYU(FM) to specify operation on the higher class channel. *See Notice of Proposed Rule Making*, 4 FCC Rcd 7575 (1989). The Commission also has before it the petition of Douglas Broadcasting, Inc. to substitute Channel 250C3 for Channel 252A at Lynchburg, and to modify its license for Station WGOL(FM), accordingly (RM-7431).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-450

In the Matter of

Amendment of Section 73.202(b),	RM-6806
Table of Allotments,	
FM Broadcast Stations.	
(Rogers, Arkansas)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 31, 1990; Released: August 14, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 4 FCC Rcd 7497 (1989), issued in response to a petition filed on behalf of R & R Broadcasting, Inc. (petitioner), licensee of Station KAMO-FM, Channel 232A, Rogers, Arkansas, proposing the substitution of Channel 232C3 for Channel 232A, and modification of its license to specify operation on the higher-powered channel. Petitioner filed comments in support of the proposal. Teresa Brown ("Brown") also filed comments,[1] to which the petitioner responded. No other comments were received.

2. Brown states that while she does not object to the petitioner's proposal *per se*, she is concerned that it afford protection to the proposed C2 contour of Station KOLX(FM) at Barling, Arkansas. Petitioner responded by stating that according to the engineering studies appended to its proposal, the site selected for Station KOLX(FM) on Channel 233C2 at Barling will not be affected by the instant proposal.

3. As stated in the *Notice*, Channel 232C3 can be allotted to Rogers, Arkansas, at the petitioner's specified site,[2] 8.8 kilometers (5.5 miles) northeast of the community, consistent with the Commission's minimum distance separation requirements. [3]

4. In consideration of the above, we believe the public interest would be served by substituting Channel 232C3 for Channel 232A at Rogers, Arkansas, since it could provide the community with its first wide coverage area FM service. Therefore, and in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying the license of Station KAMO-FM to specify operation on Channel 232C3 in lieu of Channel 232A, as requested.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 27, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Rogers, Arkansas	232C3

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license issued to R & R Broadcasting, Inc. for Station KAMO-FM, Rogers, Arkansas, IS MODIFIED effective **Septembeer 27, 1990,** to specify operation on Channel 232C3 in lieu of Channel 232A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] At the time this proposal was filed, Brown was the licensee of Station KPHN(FM), Channel 232A at Barling, which was subsequently modified to Channel 233C2 in MM Docket No. 85-156. An assignment of the license to Demaree Media, Inc. (BALH-900122HC) was granted March 23, 1990, and consummated April 4, 1990. Thereafter, the call letters were changed to KOLX(FM).

[2] Coordinates at the petitioner's specified site for Channel 232C3 at Rogers are 36-24-00 and 94-04-00. The distance between the petitioner's indicated site and that specified by Station KOLX(FM) in its application for a construction permit on Channel 233C2 at Barling (File No. BPH-900125IB), at coordinates 35-13-03 and 94-01-08, is 131.3 kilometers. Since a minimum separation of only 117 kilometers is required in this instance, the concern for protection to the C2 application at Barling is unfounded.

[3] Since this proposal was filed prior to October 2, 1989, the minimum distance spacing requirements are based on those specified prior to the revision of the Commission's Rules in MM Docket No. 88-375, 4 FCC Rcd 6375 (1989). Thus, the petitioner may avail itself of the provisions of § 73.213(c) of the Commission's Rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-357

In re Applications of

PALMETTO COMMUNICATIONS COMPANY
Yadkinville,
North Carolina — File No. BP-870331BK

TRIAD NETWORK, INC.
Greensboro,
North Carolina — File No. BP-870928AA

For Construction Permit
for a New AM Station

Appearances

Peter Gutmann on behalf of Palmetto Communications Company; *Hugh R. Overholt* and *Stephen T. Yelverton* on behalf of Triad Network, Inc.; and *Larry A. Miller* on behalf of Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

Issued: August 2, 1990; Released: August 13, 1990

1. The two applicants remaining in the caption and one other, now dismissed, were designated for hearing to determine the following issues (4 FCC Rcd 6512 (1989)):

> 1. To determine: (a) the areas and populations which would gain or lose primary aural service from the proposal of Palmetto Communications Company and the availability of other primary service to such areas and populations, (b) the areas and populations which would receive primary aural service from the Triad Network, Inc. proposal and the availability of other primary service to such areas and populations, and (c) in light thereof and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which proposal would better provide a fair, efficient and equitable distribution of radio service.
>
> 2. To determine in the event it is concluded that a choice between the applicants should not be based solely on considerations relating to Section 307(b) which of the proposals would, on a comparative basis, better serve the public interest.
>
> 3. To determine in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

2. A prehearing conference was held on October 27, 1989. Tr. 1-13. All testimony was submitted in writing at a hearing session on January 22, 1990. Tr. 14-165.[1] The record was closed on February 1, 1990. Tr. 164; *Memorandum Opinion and Order*, FCC 90M-158, released January 24, 1990. Proposed findings of fact and conclusions of law were filed by all parties on February 12, 1990 and replies were filed on February 22, 1990.

FINDINGS OF FACT

1. To determine pursuant to Section 307 (b) of the Communications Act of 1934, as amended, which proposal would better provide a fair, efficient and equitable distribution of radio service.

> (a)The areas and populations which would gain or lose primary aural service from the proposal of Palmetto Communications Company and the availability of other primary service to such areas and populations

3. Palmetto is the licensee of AM broadcast station WDIX[2], operating on 1480 kHz with 1 kW of power and a two tower directional antenna. Palmetto is authorized to operate WDIX with 27 watts at night using its daytime antenna. Triad Exh. 5, at 1. It seeks to change frequency from 1480 kHz to 1470 kHz with a daytime power of 2.5 kW using a nondirectional antenna and with a nighttime power of 0.7 kW employing a two tower directional antenna system. Triad Exh. 4, at 5.

4. WDIX is the only station licensed to Yadkinville. Palmetto Exh. 1, at 1. At least five primary aural services cover the entire 0.5 mV/m WDIX contour gain area day and night and the community of Yadkinville. Triad Exh. 4, at 6, 29-32. The proposal would result in the following gains with WDIX's daytime coverage contours:

WDIX 2 mV/m Contour Gain

	Population	Area (Sq. Km)
1980 Census	6,473	290.4
1986 Census Update	6,765	290.4
		Triad Exh. 4, at 26.

WDIX 0.5 mV/m Contour Gain

	Population	Area (Sq. Km)
1980 Census	25,173	1,146
1986 Census Update	27,007	1,146
		Triad Exh. 4, at 27.

5. WDIX has authority to operate at night with 27 watts but it does not have a nighttime operation. Triad Exh. 5, at 1. Based on WDIX's present nighttime limitation of 8.5 mV/m WDIX would provide the following area and population with interference free service at night:

WDIX Interference Free Contour As Presently Authorized

	Population	Area (Sq. Km)
1980 Census	1,398	18.7

Palmetto Reb. Exh. 1, at 5; Triad Exh. 4, at 31.

The nighttime limitation on WDIX's operation as proposed is 6.7 mV/m. Triad Exh. 4, at 7. Its interference free coverage would be as follows:

WDIX Interference Free Contour As Proposed

	Population	Area (Sq. Km)
1980 Census	5,993	129.1
1986 Census Update	6,238	129.1

Triad Exh. 4, at 31.

6. The gain in Palmetto's nighttime interference free coverage from its present PSSA to its proposed authorization is as follows:

	Population	Area (Sq. Km)
1980 Census	4,595	110.4

Palmetto Rebuttal Exh. 1, at 5; Triad Exh. 4, at 31

7. At least five primary aural services encompass the entire nighttime gain area and the community of Yadkinville. Triad Exh. 4, at 7, 32.

8. WDIX's current nighttime interference free contour, 8.5 mV/m PSSA, covers 1.55 sq. km of the total 3.56 sq. km of Yadkinville. It would have covered 965 of 2,216 people in Yadkinville in 1980 and 1,008 of the 2,315 people in Yadkinville in 1986. Triad Exh. 4, at 31-A.

(b) The areas and populations which would receive primary aural service from the Triad Network, Inc. proposal and the availability of other primary service to such areas and populations

Daytime
Triad's Proposed 2 mV/m Contour

	Population	Area (Sq. Km)
1980 Census	335,844	2,243
1986 Census Update	368,902	2,243

Triad's Proposed 0. 5 mV/m Contour

	Population	Area (Sq. Km)
1980 Census	867,005	8,356
1986 Census Update	907,788	8,356

Triad Exh. 4, at 13.

Nighttime

9. The nighttime limit for Triad's proposed operation is 6.5 mV/m. Triad Exh. 4, at 2. With this limitation, the area and population within Triad's nighttime interference free contour is as follows:

Triad's Proposed Interference Free Contour

	Population	Area (Sq. Km)
1980 Census	127,712	530.4
1986 Census Update	132,120	530.4

Triad Exh. 4, at 14.

10. All of Triad's proposed daytime and nighttime coverage areas are served by primary aural service of five or more stations. Triad Exh. 4, at 4, 5, 20-22. In addition, the following radio stations are licensed to Greensboro, North Carolina. Triad Exh. 4, at 16; Palmetto Exh. 1, at 1-2.

Stations Licensed to Greensboro

Call Sign	Service	Frequency	Class	Hours
WPET	AM	950 kHz	III	Daytime
WGLD	AM	1320 kHz	III	Unlimited
WKEW	AM	1400 kHz	IV	Unlimited
WQMG	AM	1510 kHz	II	Daytime
WNAA	Ed-FM	90.1 MHz	C2	Unlimited
WQFS	Ed-FM	90.9 MHz	A	Unlimited
WQMG	FM	97.1 MHz	C	Unlimited
WKSI	FM	98.7 MHz	C	Unlimited
WUAG	Ed-FM	106.1 MHz	D	Unlimited

Community attributes

1. Yadkinville

11. Yadkinville, North Carolina, had a 1980 census population of 2,216 people and an estimated 1985 population of 2,293 people. Palmetto Exh. 2, at 6. Yadkinville is located in the approximate center of Yadkin County. Palmetto Exh. 2, at 1. Yadkin County had a 1980 population of 28,439 persons with an estimated 1985 population of 29,365 persons. Palmetto Exh. 2, at 6. Yadkinville is the county seat and the county's largest community. Palmetto Exh. 2, at 1. Because it is the county seat, various county offices are located in Yadkinville. These offices include the county fire marshal, emergency services, county manager, and county sheriff. Palmetto Exh. 2, at 21-24. Yadkinville is located 45 miles from Greensboro, a 55 minute drive. The city has a water distribution system, a sewer system and provides solid waste disposal. The primary roads serving Yadkinville are U.S. 421 and N.C. 601. The community does not have railroad service or bus service and is not located on an interstate highway. The nearest commercial airport is in Greensboro. Palmetto Exh. 2, at 6-7.

12. Yadkinville has a council-manager form of government. The city has a police department with 5 full-time employees. A volunteer fire department with 2 trucks provides service to the city. Yadkinville relies on the county for ambulance service and rescue squads. Yadkinville has a planning commission and zoning ordi-

nances. The city has two banks, two savings and loans, and an industrial revenue bond authority. Yadkinville has one weekly newspaper. Palmetto Exh. 2, at 2.

13. Yadkinville has 10 churches, two motels, one shopping center, eight public tennis courts, one private golf course and one country club. The city also has a library and various civic clubs. There is one hospital, with 50 beds, one clinic, 10 doctors and five dentists serving the city. The entire county has a consolidated school system with one of the elementary schools being located in Yadkinville. Palmetto Exh. 2, at 8. The city also has a funeral home. Palmetto Exh. 2, at 20. It does not have a public swimming pool or public golf course.

2. Greensboro

14. Greensboro, North Carolina, had a 1980 census population of 155,642 and an estimated 1988 population of 193,850 people. It is located in Guilford County which had a 1980 population of 317,154 people and an estimated 1988 population of 342,000 people. Greensboro has a water distribution system, a separate storm sewer system and provides solid waste disposal. The city is served by two interstate highways, four other federal highways and numerous state primary roads. Greensboro is served by the Norfolk Southern Railroad, numerous motor freight carriers and has a nearby commercial airport. Bus service is also provided to Greensboro by Trailways and Greyhound. Triad Exh. 3, at 1-2.

15. Greensboro has a council-manager form of government. The city has a police department with 375 full-time employees and a fire department with 282 full-time employees and 1,000-1,200 volunteers. The fire department has six truck companies, two tankers and 14 engine companies. The county provides ambulance service while the city has its own rescue squads. The city has a planning commission and zoning ordinances. There are 16 banks, five savings and loans and an industrial revenue bond authority located in Greensboro. There is one local daily newspaper. Triad Exh. 3, at 2.

16. Greensboro has over 350 churches, 53 motels, more than 65 shopping centers, 8 public pools, 88 public tennis courts, 3 public and 18 private golf courses, a water theme park, five country clubs, three YMCA's, two YWCA's, 16 movie theatres and 169 parks. Greensboro also has numerous cultural activities including the Greensboro symphony, Eastern Music Festival, UNC-G Winter Concert Series, Greensboro Historical Association, Natural Science Center of Greensboro, Center for Creative Arts, Community Theatre, Civic Ballet Theatre, Weatherspoon Art Gallery, Green Hill Art Gallery, Planetarium and Zoo, Civic Orchestra, Concert Band, Choral Society and Barn Dinner Theatre. There are four hospitals with 1100 beds, 32 clinics, 500 doctors and 170 dentists serving the county. Greensboro has its own school system with 24 elementary, six junior high and four high schools. There are several colleges and universities with campuses in Greensboro, including UNC-Greensboro, NC A&T State University, Guilford College, Bennett College, Greensboro College and Guilford Technical Community College. The city also has a local development corporation and its own chamber of commerce. Triad Exh. 3, at 3.

2. Comparative characteristics of the applicants

17. *Palmetto* is a general partnership with two equal partners, William B. Hallman and Robert C. Rickenbacker, Jr. Palmetto was the successor in interest of Childress Radio Company. Childress, on the B cutoff date, proposed to operate the facility and it was not until August 30, 1989 that Childress applied to assign the facility to Palmetto. Therefore, in keeping with the Commission's prohibition against allowing applicants to amend and upgrade their comparative proposals after the B cutoff date, Palmetto may not claim comparative credit for integration proposed by its owners. Apparently, none of the owners of Childress proposed to work at the station if they had received a grant. The Childress Radio Company was owned by three equal partners, James B. Childress, Mickie C. Childress and Suzanne C. Childress. Together they also owned 59% of WRGC-AM, Sylva, North Carolina. The station operates with 1,000 watts daytime and 250 watts nighttime. The Childresses also control 61% of WBRM-AM, Marion, North Carolina which operates with 5,000 watts daytime.[3] Palmetto proposes auxiliary power. Palmetto Exh. 3.

18. *Triad* is a corporation with one stockholder, Walter C. Cockerham. Triad Exh. 1. Mr. Cockerham is president, treasurer and a director; his son, Gregory E. Cockerham, is vice president, secretary, and a director. *Id.* Triad proposes no integration of ownership into management. *Id.* Triad and its owner have no mass media interests. *Id.*

CONCLUSIONS

19. Palmetto's proposal would better provide a fair, efficient and equitable distribution of radio service because it would provide the first local nighttime transmission service to the entire community of Yadkinville, North Carolina. Triad proposes another facility for Greensboro, North Carolina which already has seven full-time stations. The designation order directed that a determination be made of available service. Both communities have five or more aural reception services day and night. Palmetto's proposal is to change frequencies in order to gain more power for its full-time service. While Palmetto currently has authority to operate at night, that authority is limited to 27 watts of power. The power is so slight that it covers only part of the community of Yadkinville. The population reached is only 1,398 people of Yadkinville's 2,216 people. None of its nighttime contour is protected from interference. (WDIX does not now operate at night with its current authorization.) Under Palmetto's nighttime proposal, it will increase its nighttime coverage from 18.7 sq. km to 129.1 sq. km. The population will increase from 1,398 to 5,993. And WDIX's nighttime contour will be protected. Palmetto's proposal will provide a first local transmission service to all of Yadkinville. *Faye & Richard Tuck, Inc.* KBEC, 3 FCC Rcd 5374, 5375-76 (1988).

20. Triad urges that because it is applying for a frequency that was formerly assigned to Greensboro, the Commission should continue to allocate the frequency there. Triad provides no authority for that view. When frequencies become available, the Commission assesses the allocations criteria and determines which proposal will best serve them. The reasons which originally resulted in the Commission assigning the frequency to Greensboro have apparently now changed. The choice between Greensboro and Yadkinville is a clear one. There is no precedent for assigning another frequency to a commu-

nity with numerous local voices when another lacks one. Triad also asserts, but does not demonstrate, that §307(b) should not apply because Yadkinville is actually part of the community of Greensboro. There is no support for that claim. Yadkinville is not part of the Greensboro metropolitan area, its 0.5 mV/m signal will not reach Greensboro and it has separate community institutions. *See RKO General, Inc. (KFRC)*, 5 FCC Rcd 3222 (1990).

21. Because the §307(b) determination is dispositive, the standard comparative issue will not be considered. *Pasadena Broadcasting Co. v. FCC*, 555 F.2d 1046, 1050 (D.C. Cir. 1977).

ACCORDINGLY, IT IS ORDERED that the petition for leave to amend, filed December 18, 1989 by Palmetto Communications Company IS GRANTED and the amendment IS ACCEPTED.

IT IS FURTHER ORDERED that the petition for leave to file rebuttal exhibit and for acceptance thereof, filed February 1, 1990 by Palmetto Communications Company IS GRANTED and the exhibit IS ACCEPTED.

IT IS FURTHER ORDERED that the application of Triad Network, Inc. (File No. BP-870928AA) IS DENIED and the application of Palmetto Communications Company (File No. BP-870331BK) for 1470 kHz, 0.7 kW, 2.5 kW-LS, DA-NU at Yadkinville, North Carolina IS GRANTED.[4]

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTES

[1] On February 1, 1990, Palmetto filed a Petition for Leave to File Rebuttal Exhibit and Acceptance Thereof. The purpose of the exhibit was to correct errors in Triad Exhibit 4. The petition is unopposed and the exhibit will be accepted.

[2] Before November 14, 1989, the station used the call letters WYDK.

[3] Palmetto argued when the assignment from Childress was approved that it should be permitted to assert integration based on Palmetto's owners. That request was denied. *Memorandum Opinion and Order*, FCC 89M-2822, released December 22, 1989. In its proposed findings Palmetto asserts again that the ruling was incorrect and that reasons given in *Daytona Broadcasting, Inc.*, 103 F.C.C. 2d 931 (1986) support that claim. In that case the Commission said exactly the opposite of what Palmetto is claiming. First, the Commission explained that the posthearing merger that was allowed "was narrowly based upon the peculiar facts" of the case. If the merger had not terminated the hearing, the Commission explained, the merger would have been closely scrutinized to prevent any improper upgrading after the applications had been frozen for comparative purposes. That principle was applied in this case.

[4] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision will become effective 50 days after its public release pursuant to Sec. 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-421

In re Applications of

SCIOTO BROADCASTERS, Limited Partnership	File No. BPH-870514MU
MID-OHIO RADIO LIMITED	File No. BPH-870515NM
HORACE E. PERKINS	File No. BPH-870515NP

For Construction Permit for
New FM Station, Channel 298A,
Columbus, Ohio

Appearances

George R. Borsari, Jr., on behalf of Mid-Ohio Radio Limited; *William E. Kennard*, on behalf of Scioto Broadcasters, Limited Partnership; *Robert B. Jacobi, Lawrence N. Cohn*, and *Cheryl R. Glickfield*, on behalf of Horace E. Perkins.

DECISION

Adopted: June 22, 1990; Released: August 14, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

Board Member ESBENSEN:

1. Now before the Review Board are the *Initial Decision*, 5 FCC Rcd 424 (1990) (I.D.), of Administrative Law Judge Edward J. Kuhlmann (ALJ), and the exceptions (and replies) filed by the three remaining parties to this proceeding: [1] Scioto Broadcasters, Limited Partnership (Scioto); Mid-Ohio Radio Limited (Radio); and Horace E. Perkins (Perkins). Based upon our review of the pleadings, the hearing record below, and having heard oral argument on June 15, 1990, we affirm the ALJ's award of the construction permit at issue for a new Class A FM facility at Columbus, Ohio to Perkins.

2. In addition to the standard comparative issue, the *Hearing Designation Order*, 3 FCC Rcd 5480, 5484 (1988) (HDO), specified the following relevant issues (I.D., para. 1):

> [1] To determine, with respect to . . . Perkins:
>
> (a) The basis for, and the validity of, the cost estimates projected by . . . Perkins to build and to operate [his] respective proposed facilities without revenues for three months;
>
> (b) Whether [Perkins has] . . . sufficient net liquid assets on hand, or available from committed sources to construct and operate [his] . . . proposed facilities for three months without revenues;
>
> (c) Whether, in light of the evidence adduced pursuant to the foregoing issues, [Perkins is] financially qualified.
>
> [2] To determine whether the proposal of the following applicants would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section: Scioto, Radio, and Perkins.
>
> [3] If an environmental impact statement is issued with respect to Perkins, in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether its proposal is consistent with the National Environmental Policy Act, as implemented by Sections 1.1301-1319 of the Commission's Rules.

CITY OF LICENSE COVERAGE ISSUE

3. No party has excepted to the ALJ's ultimate conclusion that (I.D., para. 88):

> None of the applicants are able to provide 80% coverage of the entire city of Columbus, although each will cover at least 71.4% of the city. The Mass Media Bureau has supported waiving the city coverage rule, § 73.315(a), [47 CFR § 73.315(a)], because the area of the city is too great to permit coverage of 3.16 mV/m with a Class A FM channel. The failure to cover the entire city is ameliorated, the Bureau believes, by the fact that the applicants will cover 85% or more of the population. A waiver will be granted to every applicant.

PERKINS

4. *Financial Considerations*: In the HDO, the Mass Media Bureau (Bureau) noted that it had randomly selected this proceeding to examine the financial aspects of each applicant pursuant to the Commission's *Public Notice*, FCC 87-97, released March 19, 1987. With respect to Perkins' estimates for construction and operation, the Bureau observed that his estimates were lower than those of the other applicants, and noted that the bank letter relied upon by Perkins to establish his financial qualifications did not indicate a specific interest rate to be charged for his proposed loan. It thus specified issues to inquire into Perkins' estimates and availability of funds, and whether or not he was financially qualified. HDO at 5482, 5484. No financial misrepresentation (or lack of candor issue arising therefrom) was specified against Perkins. *See id.*, at 5484.

5. Within thirty days of publication of the HDO, Perkins timely filed a Petition for Leave to Amend his application. The amendment included, *inter alia*, a new equipment cost estimate prepared by Harris Corporation, a revised monthly operating budget, and a letter dated October 24, 1988 from the Huntington National Bank

(Bank) indicating that it would loan Perkins up to $350,000, and specified the interest rate to be charged on the loan. The same day Perkins filed his amendment, he also filed a Motion for Summary Decision on the designated financial issues, contending that the amendment conclusively demonstrated that he was financially qualified to construct and operate his proposed facility.

6. Perkins' Petition for Leave to Amend was not opposed by any party. Perkins' Motion for Summary Decision was opposed only by Radio; however, that applicant raised no argument about the sufficiency of Perkins' revised financial proposal. Radio merely contended that Perkins' Motion did not address the alleged shortcomings in his initial financial proposal. By *Memorandum Opinion and Order*, FCC 88M-4151, released December 6, 1988, the ALJ (1) granted Perkins' unopposed Petition; (2) concluded that Radio's opposition to Perkins' Motion had thereby been rendered moot; and, (3) granted Perkins' Motion for Summary Decision.

7. In their Exceptions, Radio and Scioto argue that the financial issue against Perkins should not have been resolved by summary decision. Radio focuses on Perkins' initial proposal (submitted July 1, 1987), claiming that the ALJ's summary decision "had the effect of foreclosing any inquiry into the financial issue designated by the Commission." [2] Radio Exceptions at 6-7. Additionally, Radio and Scioto also now argue, for the first time, that Perkins' Motion for Summary Decision was improperly granted because, in their view, Perkins' amended financial showing relied upon a bank letter which was not a commitment to make a loan, but rather a mere "accommodation" letter. Radio Exceptions 8 - 11; Scioto Exceptions 20 - 23. These exceptors note that the October 24, 1988 Huntington Bank letter is conditioned on the following: (1) the filing of a formal loan application with the Bank; (2) collateral values and appraisals satisfactory to the Bank; (3) approval by the appropriate lending authorities of the Bank; and (4) financial information satisfactory to the Bank.

8. More specifically, the October 24, 1988 Bank letter provides as follows (Scioto Exceptions, Attachment 2):

> Mr. Horace E. Perkins
> 1039 Sunbury Road
> Columbus, Ohio 43219
>
> Dear Mr. Perkins:
>
> This letter will confirm the willingness of The Huntington National Bank to make available up to $350,000 for the purpose of constructing and operating a new FM Radio Station at Columbus, Ohio. While the final terms and conditions can not be established until the time at which such a loan would be extended, we have discussed a loan having the following terms:
>
> Borrower: Horace E. Perkins, an individual.
>
> Loan Amount: Three Hundred Fifty Thousand and No/100 Dollars ($350,000.00).
>
> Use of Proceeds: Start up costs associated with the financing of a FM Radio Station to be located in Columbus, Ohio.
>
> Interest Rate: Huntington National Bank Prime Commercial Rate, as defined in our loan documents, plus 2% and a 1% fee. The Prime Rate as of October 11, 1988 is 10.0%.
>
> Repayment: 5 Year term loan; interest only to be paid on the outstanding balance monthly for the first six months. Monthly Principal payments of $5,833 plus interest will begin six months after the loan is closed.
>
> Collateral: First lien on equipment and 2nd mortgage on real estate located at 1039 Sunbury Road.
>
> Our approval to advance the above-described loan is expressly subject to the following conditions:
>
> 1. The filing of a formal loan application with our Bank.
>
> 2. Collateral values and appraisals satisfactory to our Bank.
>
> 3. Approval by the appropriate lending authorities of our Bank.
>
> 4. Financial information satisfactory to the Bank.
>
> This letter is not to be construed as an approval or commitment for the above loan; rather it indicates our willingness to extend the above loan provided that the preceding conditions are met.
>
> Sincerely,
>
> Robert W. Erwin
> Vice President

9. Turning first to procedural considerations, the ALJ properly accepted Perkins' financial amendment pursuant to 47 CFR § 73.3522(b)(2). Perkins timely filed this amendment within 30 days of the publication of the HDO which, for the first time, raised financial issues against Perkins. Thus, Perkins' amendment was timely filed "as a matter of right." Additionally, since Radio and Scioto did not raise any objection as to the adequacy of Perkins' amended financial showing for nearly two years (until the filing of their exceptions before the Board), these untimely exceptions could be dismissed without further consideration. Nonetheless, in the interest of clarity, the Board will address Perkins' financial qualifications.

10. The Board has recently observed in numerous proceedings (1) that substantial and material questions of fact have been raised about financial proposals which have required a remand for further hearings on appropriate financial issues; or, (2) that various applicants must be disqualified on already-specified financial issues. *See, e.g., Shawn Phalen*, 5 FCC Rcd 53, 54 (Rev. Bd. 1990) (remand ordered where additional document from lending institution and principals' own testimony raised substantial and material questions of fact as to financial qualifications); *Global Information Technologies, Inc.*, 5 FCC Rcd

3385 (Rev. Bd. 1990) (remand where bank letter, *inter alia*, stated "although we have not reviewed financial information required by us to fully consider a loan commitment, we are *seriously interested in exploring* " a potential loan) (emphasis added); *Rebecca L. Boedker*, 5 FCC Rcd 2855 (Rev. Bd. 1990) (affirming disqualification of applicant who obtained bank letter which merely stated that the bank " *has an interest* " in financing proposed facility, and that its letter "is not a commitment but rather *an expression of interest* . . . and *a tentative plan* of structuring the financing . . . ." Also, bank officer testified letter was only an "accommodation") (emphases added); *Aspen FM, Inc.*, 5 FCC Rcd 3196 (Rev. Bd. 1990) (disqualification where principal lender did not demonstrate "sufficient net liquid assets" at time of certification); *Charisma Broadcasting Corp.*, 5 FCC Rcd 2916 (Rev. Bd. 1990) (remand where questions raised as to documentation of availability of funds).

11. Although an applicant need not have a binding written agreement to certify that it is financially qualified, *Las Vegas Valley Broadcasting Co. v. FCC*, 589 F.2d 594, 599-601 (D.C. Cir. 1978), the Commission does require "reasonable assurance" of committed funding to construct the proposed facility and to operate for three months without revenue. The application form utilized by Perkins (*see* FCC Form 301, Instructions, Section III) provided as follows:

> An applicant for a new station must certify that it has sufficient net liquid assets on hand or committed sources of funds to construct the proposed facility and operate for three months, without revenue. In so certifying, the applicant is also attesting that it can and will meet all contractual requirements, if any, as to collateral, guarantees, and capital investments.

Additionally, the certifications specifically required by Questions 1 and 2 of Section III, FCC Form 301, were as follows:

> 1. The applicant certifies that sufficient net liquid assets are on hand or are available from committed sources to construct and operate the requested facilities for three months without revenue.
>
> 2. The applicant certifies that: (a) it has a reasonable assurance of a present firm intention for each agreement to furnish capital or purchase capital stock by parties to the application, each loan by banks, financial institutions or others, and each purchase of equipment or credit; (b) it can and will meet all contractual requirements as to collateral, guarantees, and capital investment . . . .

See JAM Communications, Inc., 4 FCC Rcd 3754, 3757 (Rev. Bd. 1989). And, as the Commission noted in *Northampton Media Associates*, 4 FCC Rcd 5517, 5518-19 (1989):[3]

> In order to prove reasonable assurance of financial qualifications at the time of certification, the applicant must adduce probative evidence that, prior to certification, it engaged in serious and reasonable efforts to ascertain predictable construction and operation costs. To establish the availability of funds to meet these estimated expenses, the applicant must provide substantial net liquid assets on hand, or committed sources of funds to construct and operate for three months without revenue . . . .
>
> * * *
>
> Probative evidence necessarily includes something more than the self-serving, uncorroborated statement of the individual responsible for the certification that he had taken steps to secure the needed funds. For example, uncontroverted affidavits or testimony establishing an oral contract to lend money would suffice to demonstrate a committed source of funds.

As the Board stated in *Las Americas Communications, Inc.*, 1 FCC Rcd 786, 788 (Rev. Bd. 1986):

> The law is and remains that loan agreements and bank commitment letters must be prepared and must be sufficiently specific and complete to furnish reasonable assurance of the availability of the loans. *Jay Sadow*, 39 FCC 2d 808, 810, 26 RR 2d 1032, 1035 (Rev. Bd. 1973).

12. Thus, in order for the Board to determine that an applicant has "reasonable assurance" of "committed sources of funds" from a lending institution, we will review the following factors: Whether (1) the bank has a long and established relationship with the borrower sufficient to infer that the lender is thoroughly familiar with the borrower's assets, credit history, current business plan, and similar data, *see Multi-State Communications, Inc. v. FCC*, 590 F.2d 1117 (D.C. Cir. 1978); or, (2) the prospective borrower has provided the bank with such data, and the bank is sufficiently satisfied with this financial information (*e.g.*, collateral guarantees, *see Chapman Radio and Television Co.*, 70 FCC 2d 2063, 2072 (1979)) that, *ceteris paribus*, a loan in the stated amount would be forthcoming, and that the borrower is fully familiar with, and accepts the terms and conditions of the proposed loan (*e.g.*, payment period, interest rate, collateral requirements, and other basic terms). Short of these ordinary fundamentals, it would be difficult to infer "reasonable assurance" from a "committed source." In other words, central to any successful "reasonable assurance" showing of a loan from a financial institution is that the "individual qualifications" of the borrower have been preliminarily reviewed, *Christina Communications*, 2 FCC Rcd 1971, 1974 (1987), that adequate collateral has been demonstrated, *Chapman Radio, supra*, and that the tentative terms of the loan are specifically identified and are satisfactory to both borrower and lender. As noted above, where these fundamentals have been absent in recent cases, the Board has found no "reasonable assurance." *See, e.g., Rebecca Boedker, supra; Marlin Broadcasting of Central Florida, Inc.*, 4 FCC Rcd 7945, 7946 (Rev. Bd. 1989). Conversely, where these fundamentals have been satisfied, we have found such "reasonable assurance." *See, e.g., Colonial Communications, Inc.*, 5 FCC Rcd 1967 (Rev. Bd. 1990), *recon. denied*, FCC 90R-52, released June 25, 1990.

13. We find here that Perkins had established the requisite "reasonable assurance" of the "present firm intention" of the Huntington Bank to make funds available to him. While the Bank's letter is not a binding written agreement (which, of course, is not required, *see Las Vegas Valley, supra),* Perkins has submitted a document (the Bank letter) which specifically (1) identifies the borrower/applicant; (2) indicates the amount of the loan; (3) identifies the specific use of the proceeds of the proposed loan; (4) specifies a particular interest rate; (5) specifies terms of repayment; (6) identifies the specific collateral required; and (7) identifies specific conditions for final approval. Moreover, the exceptors have proffered nothing to indicate that the Bank letter is not valid, or is merely an "accommodation letter." *See generally Christina Communications, supra.* Indeed, as the Commission declared in *Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 166, 167 (1980):

> Insofar as the bank's specific requirements are concerned, we are not troubled by the following language: "(t)his commitment is contingent upon final terms and amounts of capitalization of our potential borrower, the Merrimack Valley Broadcasting Co., Inc., being satisfactory to the Bank." For a bank to base its final decision on conditions existing at the time a grant is actually made is a common business practice which does not in and of itself make reliance on the commitment unjustified. *Multi-State Communications, Inc. v. FCC*, 590 F.2d 1117 (D.C. Cir. 1978), 44 RR 2d 487. A present firm intention to make a loan, future conditions permitting, is the essence of our "reasonable assurance" standard.

Thus, in light of the admitted failure of the exceptors to timely raise objections to Perkins' amended financial showing, and their failure to raise substantial and material questions of fact as to Perkins' "reasonable assurance" of the "present firm intention" of the Huntington Bank to make funds available to him to construct and operate as proposed, "future conditions permitting," all exceptions in this regard are denied.

14. *Actions of Counsel*: Scioto urges that Perkins' counsel, Cohn and Marks, should have been "disqualified" in this proceeding. More specifically, Scioto (1) contends that Perkins' counsel violated the Code of Professional Responsibility by its representation of Perkins in this proceeding and its simultaneous representation of another former applicant here, Clear Channel Communications, Inc. (Clear Channel), in matters unrelated to this proceeding; and (2) seeks a remand for additional cross-examination of Perkins, due to alleged inadequate examination of him at hearing. Perkins replies (Reply to Exceptions at 11-12) that counsel commenced representation of Perkins in connection with this Columbus allocation several years prior to the announcement of the Columbus "filing window." After the window was announced, another client of the firm, Clear Channel, expressed interest in filing for this same frequency. Counsel informed Clear Channel of its prior retention by Perkins, and advised that it could not represent Clear Channel in this proceeding. "The firm also discussed the matter with Perkins, informing him of the various ways in which its ability to represent him would be limited, should he desire to continue to retain the firm as his counsel." (*Id.*) Perkins consented to these limitations on the firm's ability to represent him, and reaffirmed retention. Perkins claims he "did so because he saw no need to attack Clear Channel's application in this proceeding, given that his own comparative credentials would of necessity be greatly superior to any showing which the publicly-traded, multi-station owner Clear Channel entity could hope to muster." (*Id.*)

15. It is further claimed by Perkins that, "due to the disparity between the relative comparative strengths of the two applicants," counsel perceived no need to engage in any attack on the Clear Channel application in order to provide adequate representation of Perkins, and "it therefore did not withdraw from representation of Perkins. Clear Channel, as well, perceived no conflict in the situation, and it proceeded to retain its own separate, independent counsel, the firm Wilner & Scheiner, to represent it in connection with its Columbus application" (*id.*). Thus, Perkins' counsel did not perceive any reason requiring it to withdraw from representation of Perkins in this proceeding because (1) the two clients involved gave their consent to the multiple representation; (2) Perkins requested that the firm continue as his counsel; and (3) the firm did not perceive any impediment, under the specific circumstances of the case, to its ability to render representation "adequate to the purposes of [its] clients." Perkins' counsel further claims that this action "was consistent with the applicable disciplinary rules, as interpreted by the relevant D.C. Bar Legal Ethics Committee opinions." (*Id.*)

16. Both the Board and the Commission are reluctant to resolve claims of attorney misconduct in advance of review by relevant bar officials charged with maintaining ethical standards, *see, e.g., Opal Chadwell*, 2 FCC Rcd 3458 (1987), and will intervene only where, for example, a conflict is so clear that an untainted record would be all but impossible to achieve, thus requiring a hearing *de novo, see Dorothy J. Owens*, 104 FCC 2d 848 (Rev. Bd. 1986), *review denied*, 2 FCC Rcd 38 (1987), *petition for judicial review dismissed on other grounds sub nom. Law Offices of Seymour M. Chase, P. C. v. FCC*, 843 F.2d 517 (D.C. Cir. 1988) (table), or where the conduct of an attorney is so opprobrious or disruptive that immediate action must be taken to preserve the integrity of FCC processes. *See , Benedict P. Cottone*, 39 RR 2d 1661, *recon. denied*, 41 RR 2d 241 (1977); *cf. Thomas Root*, FCC 90-240, released June 28, 1990. Neither situation obtains here. Upon reviewing the pertinent authorities, we find that the essence of the law's demand in situations such as that before us is "informed consent," [4] and the unchallenged representations before us reflect that Perkins' was fully aware of his counsel's long-time representation of Clear Channel in other proceedings, of counsel's refusal to seriously attack Clear Channel here, and yet retained the law firm for representation. We find no absolute conflict, nor do we believe that counsel's alleged failure to attack Clear Channel is significant. All of the other parties had a full opportunity to discredit Clear Channel (which has since withdrawn its application and has been dismissed, *see Order*, FCC 90R-56, released July 5, 1990), and Scioto has not explained how it has been prejudiced *vis a vis* any other remaining applicant. Its exceptions in this regard are denied.

17. *Perkins' Comparative Considerations*: The ALJ found that Perkins, an individual African-American applicant, proposes to work full-time as the general manager (and sales manager) of his proposed facility. Perkins has lived in the proposed community of license (Columbus, Ohio)

continuously for over 26 years, and has been employed at WVKO(AM), Columbus, Ohio for over 27 years. I.D., para. 68. Scioto does not except to these findings of the ALJ, but Radio claims that Perkins is entitled to no credit whatsoever for his 26-year continuous residence in Columbus, because Perkins "does not have any record of civic participation . . . ." (I.D., para. 104). Radio further claims that Perkins is not entitled to any credit whatsoever for his broadcast experience because his job was "non-managerial." [5] and his broadcast experience was no more "than the fact that he may have listened to the radio with interest over the last twenty years." Radio Exceptions at 21-23.

18. Radio's exceptions as to Perkins' comparative attributes will be denied. Local residence and civic participation are discrete factors and extensive residence, as here, is entitled to substantial credit in its own right. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395-396 (1965) (" *Policy Statement* "); *Radio Jonesboro, Inc.*, 100 FCC 2d 941, 947 (1985). Further, broadcast experience is cognizable, whether or not of a managerial nature. *James and Sharon Deon Sepulveda*, 3 FCC Rcd 9 (Rev. Bd. 1988); *Jarad Broadcasting Co., Inc.*, 1 FCC Rcd 181 (Rev. Bd. 1986)(subsequent history omitted); *New Continental Broadcasting Co.*, 88 FCC 2d 830, 849-850 (Rev. Bd. 1981)(subsequent history omitted)("the *Policy Statement* [does not] require that . . . broadcast experience be management-related . . . ."). Perkins will receive full credit for his proposed 100% integration into ownership and management (a factor of "substantial importance," *see Policy Statement* at 395; *Julia S. Zozaya*, 5 FCC Rcd 856 (Rev. Bd. 1990)), substantial credit for long-term local residence, significantly enhanced by extensive broadcast experience (*see Policy Statement* at 396), and minority participation (*see Metro Broadcasting, Inc. v. FCC*, 110 S.Ct. 2997 (decided June 27, 1990)). Perkins will also receive comparative credit for auxiliary power; and, because Perkins has no interest in any medium of mass communications, no demerit will be assessed in this regard. *See Policy Statement* at 394-395.

SCIOTO

19. Scioto is depicted as a limited partnership, with one general partner, Paul D. Warfield, an African-American, who holds 25% of the equity. Scioto Exh. 1, at 1. It claims three limited partners: Ernest Green, who holds 26% of the equity, Samuel Morgan, who holds 25% of the equity, and Ben Espy, who owns 24% of the equity. *Id.* Warfield proposes to work full-time as the station's general manager. Scioto Exh. 2 at 2. He will be responsible for all aspects of the management and operation of the station. I.D., para. 45. Scioto has no attributable mass media interests. *Id.*, para. 70.

20. Warfield previously lived in Columbus (from 1960 to June 1964 and from January 1965 to June 1965), apparently while a college student. From June 1987 through October 1988 he "maintained a part-time residence in Columbus." He currently lives (since November 1988) in Gahanna, Ohio, which is located within the service area of Scioto's proposed station. Warfield's permanent residence at the "B cutoff" date was Beachwood, Ohio (near Cleveland), over 100 miles from Columbus. Tr. 653-64. From June 1987 to October 1988, Warfield worked in Dayton, Ohio. Tr. 655. Over the past 16 years, Warfield has been employed by one radio station, eight television stations, and various television networks in positions including: (1) "part-time sportscaster and radio talk show host" (17 months); (2) "part-time sports anchor" (4 months); (3) "full-time assistant sports director" (2 years); (4) "analyst for NFL football" (8 months); (5) "analyst for college football" (4 months); (6) "analyst for Cleveland Browns football" (2 months); (7) "substitute analyst for NFL football" (1 game); (8) "part-time sports announcer" for NFL (3 months); (9) "part-time sports announcer" (high school football and NFL analysis) (6 months); (10) "part-time sports announcer" (1983 to present). Scioto Exh. 2, at 5-6; I.D., paras. 46-47.

21. The ALJ determined that Warfield has been active in civic affairs since he returned to the Columbus area (subsequent to the time Scioto filed its application) in 1987; however, the ALJ concluded that Warfield's residence in Columbus, and his recent civic activities, did not outweigh Perkins 27-year, continuous residence in Columbus. I.D., para. 104. While Warfield and Perkins both have broadcast experience, the ALJ concluded that Perkins was to be preferred "because his experience is full time, continuous, and of long duration." *Id.*, at para. 105.

22. Scioto does not except to any of the ALJ's findings or conclusions with respect to its application. Radio argues only that Warfield has conflicting business interests (*i.e.*, Warfield testified he will continue to work at his business, as President of Warfield and Morgan, for some 20 hours per week), and thus should not receive credit for full-time integration of ownership into management. Perkins claims that the ALJ did not quantify the "civic participation" enhancement awarded Scioto, which, at best, should only be "slight." (Perkins Contingent Exceptions at 3.)

23. With respect to Warfield's "civic participation," *MTF Enterprises*, 99 FCC 2d 297, 300-301 (Rev. Bd. 1984) holds that:

> In . . . *Bradley, Hand and Triplett*, 89 FCC 2d 657, 663 (Rev. Bd. 1982), we held that civic activities that post-date the application filing date will be accorded some credit, 'although not as much as a past record of such activities would warrant." We reasoned there that because the *Policy Statement*, *supra*, 1 FCC 2d at 396, accords some credit for proposed future local residence, albeit less weight than residence of several years' duration, and past civic participation is considered a part of an owner's local residence background, some slight credit should be awarded current civic involvement. *See also Radio Jonesboro, Inc.*, 55 RR 2d 991, 994 (Rev. Bd. 1984). Similarly, we hold that local residence beyond the application filing date might also receive some light recognition, but not so much as would accrue to a history of local residence of several years' pre-application duration.

Thus, Warfield is entitled to only slight credit for his post-filing civic activities.

24. In comparing Perkins and Scioto, both applicants are equal with respect to quantitative "integration" of ownership and management, minority enhancements, auxiliary power, and neither applicant has attributable mass media interests. However, we hold that Perkins is clearly preferred over Scioto because of his long-term continuous local residence, which significantly exceeds

Scioto's limited residence credit and minor edge for civic participation, *see Radio Jonesboro, Inc.*, 100 FCC 2d 941, 948 (1985), as well as for Perkins' longer broadcast experience. Radio's exceptions, which would only further diminish Scioto's comparative status, are thus not decisionally significant.

RADIO

25. The ALJ determined that Radio's sole general partner, Karen Murray, proposes to work full-time at the station as its general manager. Murray holds only 15% of the equity of the applicant. Of two limited partners, McFadden Communications Corporation (MCC) holds an 80% equity interest and William Roth holds a 5% equity interest. I.D., para. 94. Murray lived in Columbus at the time Radio made its proposal, and she had lived there since 1985 (for a period of two years and nine months) until early 1988. From 1980 to 1985 she was employed at various broadcast stations (*id.*, at para. 100), and was apparently somewhat involved in Columbus civic activities (*id.*, at para. 65).

26. However, the ALJ held (*id.*):

> Shaky as Ms. Murray's role has been in organizing and pursuing the proposal, it cannot be concluded that Ms. Murray would not work full time, 40 hours per week, managing the station. She is entitled to some integration credit. However, it is unestablished that Ms. Murray will be the station's general manager since the partnership agreement provides that her management role will be determined by contract with the partnership after a grant is made. The partnership agreement is silent about who will make that determination and Ms. Murray did not know who would either.

27. Radio excepts to the "reduction" of Murray's integration credit. (Radio Exceptions at 12-13.) Scioto argues that Radio is entitled to no integration credit whatsoever, claiming that Radio's application is a "sham." (Scioto Exceptions at 24-36.) Perkins agrees, noting that the *bona fides* of Radio's application was not properly tested at hearing because, *inter alia*, of the failure of attorney Douglas McFadden, a principal of limited partner MCC, to respond to questions at hearing. (Perkins Exceptions at 5-6.)

28. More specifically, Scioto observes (Exceptions at 24-33):

> The Presiding Judge concluded that Mr. McFadden organized the applicant. I.D. at para. 94. Mr. McFadden, never having inquired into or seen Ms. Murray's financial records, mailed her a limited partnership agreement, prepared by his law office. I.D. at para. 57. The agreement had the name of the limited partnership and the partners' equity percentages already filled in. *Id.* Ms. Murray retained Mr. McFadden's law firm without knowing its hourly rates. I.D. at para. 59. The firm has a deferred billing arrangement with Radio (I.D. at para. 60) even though it does not have such arrangements with the vast majority of its clients. *Id.*
>
> * * *
>
> Mr. McFadden's firm began as Radio's counsel and continues to provide legal services, on a deferred-payment basis. I.D. at para. 60. Capital contributions have not been made on a *pro rata* basis and, in Mr. Roth's case, not at all. I.D. at para. 63. Contributions have been made almost entirely by MCC. I.D. at para. 63. No negotiations ever took place over the respective ownership interest of the partners. I.D. at para. 57. Ms. Murray simply ratified the offer presented by Mr. McFadden. I.D. at para. 57.
>
> * * *
>
> Ms. Murray has paid only $1,500 to Radio to date. I.D. at para. 63. She has directed all of Radio's capital calls to MCC/McFadden which has exceeded its 80% *pro rata* share. I.D. at para. 63. Most importantly, Radio need not pay legal fees until this proceeding has terminated. I.D. at para. 60. By controlling access to legal services, Mr. McFadden is able to exert considerable influence over Radio. At the hearing, Mr. McFadden repeatedly refused to comply with the Presiding Judge's directives to answer questions. I.D. at 64. The Presiding Judge found that Mr. McFadden displayed a "hostile and contemptuous attitude" toward the Presiding Judge and was "totally uncooperative." *Id.*

29. Under the circumstances here present, Radio would not in any event be entitled to more than 15% "integration" credit for Murray's proposed role as "general manager" in light of the limited partner's active role as counsel. *Magdalene Gunden Partnership*, 3 FCC Rcd 7186 (1988) (McFadden firm involved in limited partnership; Commission holds equity interest of limited partners who provide legal services are attributable). Moreover, given the fact that Radio's partnership agreement provides that Murray's actual position at the proposed facility will not even be determined until *after* grant, even that 15% "integration" credit cannot be awarded here. *See Voce Intersectario Verdad America, Inc.*, 100 FCC 2d 1607, 1614-1615 (Rev. Bd. 1985). Radio is therefore clearly out of comparative consideration.[6]

CONCLUSIONS

30. The Board has here determined that Perkins, on a comparative basis, is entitled to 100% quantitative integration credit augmented by credit for long-term 26-year continuous residence in the proposed city of license, substantial long-term 27-year broadcast experience, minority participation, and auxiliary power. Even with Scioto's principal, Warfield, receiving 100% "integration" credit, his local residence is of significantly lesser duration. Thus, notwithstanding his slight advantage for civic participation, his minority and auxiliary power enhancements, and credit for some broadcast experience, Scioto cannot prevail over Perkins. With little or no quantitative credit, Radio finishes a distant third. In light of the foregoing, Perkins is clearly preferred, and will be awarded the construction permit at issue here.

31. With respect to the "environmental impact" issue specified against Perkins, the ALJ concluded (I.D., para. 43):

> After the close of the record, the Chief, Audio Services Division, found that there will be no adverse environmental impact from Perkins' proposal if measures to protect humans from nonionizing radiation are carried out. The Bureau requested that a grant to Perkins be conditioned to achieve that protection. On August 15, 1989, Perkins accepted the condition imposed by the Bureau.

Thus, the grant of the construction permit is conditioned to the extent that Perkins, upon construction, will be fully in compliance with the foregoing to provide protection from nonionizing radiation.

32. ACCORDINGLY, IT IS ORDERED, That the applications of Scioto Broadcasters, Limited Partnership (File No. BPH-870514MU) and Mid-Ohio Radio Limited (File No. BPH-870515NM) ARE DENIED, and the application of Horace E. Perkins (File No. BPH-870515NP), for a new Class A FM facility at Columbus, Ohio, IS GRANTED, subject to the environmental considerations set forth in paragraph 31, *supra*.[7]

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] Twelve applicants were originally designated for hearing. *See Hearing Designation Order*, 3 FCC Rcd 5480 (1988).

[2] In the HDO (at 5482), the Bureau stated as its basis for inquiry into Perkins financial qualifications that Perkins' estimates were "significantly lower than the estimates provided by the other applicants, with the exception of [two others no longer parties to this proceeding]." It is clear that the Board has no authority to review the issues specified in the HDO. *Frank F. Yemm*, 39 RR 2d 1657 (1977). Thus, the exceptors' claim that the Board should modify the HDO and add a misrepresentation issue against Perkins based upon his initial financial showing is without merit. Additionally, having reviewed the financial qualifications of Perkins (as noted in text), we find no independent basis for adding such an issue.

[3] Scioto argues (with respect to seeking a financial misrepresentation issue against Perkins) that Perkins had only "verbal discussions" with the Bank prior to the time he filed his application. As noted in the text, Perkins timely amended his application as "a matter of right" and satisfied the financial issues specified against him. As *Northampton* permits, these initial "verbal discussions" were subsequently documented, and Perkins has submitted "probative evidence" of his source of funds. "[U]nder the provisions of [FCC] Form 301 in effect [at the time Perkins filed his application], oral loan agreements are not presumptively invalid and supporting documentation need not necessarily be in existence at the time of certification." *Northampton*, at 5519.

[4] Perkins also observes (Reply at 9-10; footnotes omitted):

> Scioto's primary argument concerning the ethical issue is that the District of Columbia Code of Professional Responsibility embodies an "absolute prohibition" of what Scioto vaguely terms the "simultaneous representation of clients in the context of litigation." Scioto Exceptions at 6-9 & 14 (citing District of Columbia Bar Legal Ethics Committee Opinion No. 131). Scioto is simply wrong about the law. The provisions of DR 5-105 of the Code do not, by their express terms, create any "absolute prohibition" of multiple representation where litigation is involved, and neither the decisions which Scioto cites nor any other interpretive decisions have construed the Code as creating an "absolute prohibition" of simultaneous representation "in the context of litigation." Rather, the decisions uniformly indicate that, whether the representation in question entails litigation or other matters, it is permissible, if (1) the clients involved have given their informed consent; and (2) adequate representation can be provided . . . .
>
> D.C. Bar Ethics Opinion No. 49; *accord, e.g.*, D.C. Bar Ethics Opinion Nos. 54, 68, 92, 94, 106, 131, 136, 140, 163 & 165; *see e.g., City Consumer Services, Inc. v. Horne*, 571 F.Supp. 964, 970-71 (C.D. Utah 1983) (citing *Unified Sewerage Agency v. Jelco, Inc.*, 646 F.2d 1339 (9th Cir. 1981)); *see also Duca v. Ramark Industries*, 663 F.Supp. 184, 190 (E.D. Pa. 1986); *Clay v. Doherty*, 608 F.Supp. 295, 302-03 (N.D. 111. 1985). Indeed, many of the D.C. Bar Ethics Opinions which interpret DR 5-105(C) of the Code expressly *approve* instances of simultaneous representation *in the context of litigation. E.g.*, D.C. Bar Ethics Opinion Nos. 54, 92, 136, 140, 163 & 165; *cf.* D.C. Bar Ethics Opinion No. 106; *see also, e.g., City Consumer Services, Inc. v. Horne, supra; Clay v. Doherty, supra.*The decision on which Scioto principally relies, D.C. Bar Ethics Opinion No. 131, did not purport to create any "absolute" ban on multiple representation in circumstances involving litigation. Rather, Opinion No. 131 -- which is "the only instance in which [the D.C. Bar Legal Ethics] committee has refused to give effect to consent to simultaneous representation in circumstances not involving conflicting representation in the same matter--turned on the unique facts of the multiple" representation there involved . . . .

Finally, although not to take effect until January 1, 1991, the new *Rules of Professional Conduct of the District of Columbia Bar* continue to trend toward "informed consent" in potential conflict situations. Thus, under Rule 1.7, unless there is a conflict in the "same matter," a "lawyer may represent a client . . . if:

> "(1) Each potentially affected client provides consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation; and
>
> (2) The lawyer is able to comply with all other applicable rules with respect to such representation."

Rule 1.7(c). (We do not comment here on whether Perkins' law firm's attitude toward Clear Channel implicates Rules 1.3 ("Diligence and Zeal") for the reasons set forth in paragraph 16 of text.)

[5] Perkins claims that the ALJ failed to make a finding that Perkins "had responsibility for managing the station's sales staff in the absence of the sales manager for approximately 1 month per year during the past 5 years." Perkins Contingent Exceptions at 4. Perkins showing in this regard is uncontroverted and unimpeached.

[6] Even if Murray were to receive full 100% "integration" credit, Radio could not prevail over Perkins. Murray was a resident of Columbus between August 1985 to May 1988, promises to return to the area if Radio's application is granted, and is entitled to credit for some broadcast experience. However, none of these attributes can outweigh Perkins multiple superior comparative preferences (*see* para. 18, *supra)*. That is, Perkins' substantial local residence preference outweighs Radio's promise to have Murray relocate to Columbus and its minor civic participation credit, *see Radio Jonesboro, supra,*at 948, his minority enhancement credit exceeds Radio's female enhancement credit, *see Horne Industries, Inc.,* 98 FCC 2d at 601, 603 (1984), and Perkins plainly has greater broadcast experience than Radio.

[7] The release of this document has been delayed by computer problems.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-66

In re Applications of

BEACH BROADCASTING LIMITED PARTNERSHIP	File No. BPH-870730ML
BADEAN MEDIA FM LIMITED PARTNERSHIP	File No. BPH-870730MM
MANUEL LIMA	File No. BPH-870730MP

For Construction Permit for
New FM Station, Channel 233A,
Long Beach, Mississippi

ORDER

Adopted: July 23, 1990; Released: August 13, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, ESBENSEN.

1. Applicant Badean Media FM Limited Partnership has not filed exceptions with the Board from the *Initial Decision*, 5 FCC Rcd 3201 (1990), of Administrative Law Judge Edward Luton. Pursuant to 47 CFR §1.276(f), its application will be dismissed, with prejudice, for failure to prosecute.

2. ACCORDINGLY, IT IS ORDERED, That the application of Badean Media FM Limited Partnership (File No. BPH-870730MM), IS DISMISSED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-135

In re Applications of

CARDWELL BROADCASTING — File No. BPH-880301NT

HAPPY VALLEY BROADCASTING, INC. — File No. BPH-880301OR

For Construction Permit for
New FM Station, Channel 230A,
Turners Falls, Massachusetts

MEMORANDUM OPINION AND ORDER

Adopted: July 25, 1990; Released: August 13, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. On June 8, 1990, Historic Deerfield, Inc. (Historic Deerfield), a non-profit organization (whose stated aim is to ensure the preservation of Old Deerfield Village, Massachusetts) filed an appeal pursuant to Section 1.301(a)(1) of the Commission's Rules, 47 CFR §1.301(a)(1), from presiding Administrative Law Judge Frysiak's denial of its May 11, 1990 petition for leave to intervene in this proceeding, *Memorandum Opinion and Order* (*MO & O*), FCC 90M-1433, released June 1, 1990. Happy Valley Broadcasting, Inc. (Happy Valley), an applicant for a construction permit for a new FM station at Turners Falls, Massachusetts, opposes the appeal. The Board will deny the appeal for the reasons set out below.

2. In support of its appeal, Historic Deerfield points out that "[i]n the *Hearing Designation Order*, DA 90-347, released March 28, 1990, 55 Fed. Reg. 13830, published April 12, 1990, the Commission specified an issue to determine, in the event an adverse final environmental impact statement is issued with respect to any of the applicants, whether the proposal is consistent with the National Environmental Policy Act." Appeal at 1. Also designated was a misrepresentation/lack of candor issue related to Happy Valley's failure to inform the Commission of the proximity of its proposed tower to a Registered National Historic Landmark. Citing its "extensive knowledge" of the area, *id.* at 2, Historic Deerfield sought to intervene on both the environmental and the related misrepresentation/lack of candor issues, claiming that "it is uniquely positioned to assist the Commission in its evaluation of the environmental issues presented by the proposed tower construction [but conceding that it has] no knowledge of the particular circumstances surrounding Happy Valley's failure to disclose the proximity of its planned tower to the historic area." *Id.* at 3-4. Historic Deerfield concludes:

> Finally, the Presiding Judge pointed to the "parallel" environmental assessment proceeding pending before the Audio Services Division. Historic Deerfield has submitted comments in that proceeding on the environmental issues raised by the applications. This assistance to the Audio Services Division, however, should not be viewed by the Commission as a bar to the petition of Historic Deerfield to intervene in the hearing on this matter. *If the issue is considered at hearing, a full record should be developed* . . . .

Id. at 4 (emphasis added).

3. Happy Valley opposes the appeal and supports the ALJ's conclusions that (1) Historic Deerfield "has not demonstrated how its participation would assist the Commission's determination of the misrepresentation issue," *MO&O*, para. 3; (2) Historic Deerfield proposed no new issues, *id.*, para. 5; and (3) "[Historic] Deerfield's interest in preservation of the integrity of Old Deerfield Village was adequately protected by Commission procedures for evaluating potential environmental impacts, in which Deerfield was already participating," Opposition at 1; *see MO&O*, para. 4. Attached to Happy Valley's pleading are letters dated June 6, 1990 from the Mass Media Bureau addressed to the Massachusetts Historical Commission. These letters make clear that the Bureau is concurrently considering whether to issue a draft environmental impact statement in this proceeding. *See* Section 1.1315 of the Rules, 47 CFR §1.1315.

4. *Discussion:* Section 1.223(b) of the Rules, 47 CFR §1.223(b), which governs Historic Deerfield's petition for leave to intervene, states:

> Any other person desiring to participate as a party . . . may file a petition for leave to intervene not later than 30 days after the publication in the Federal Register . . . of the order designating an application for hearing or any substantial amendment thereto. The petition must set forth the interest of petitioner in the proceedings, must show how such petitioner's participation will assist the Commission in the determination of the issues in question, must set forth any proposed issues in addition to those already designated for hearing, and must be accompanied by the affidavit of a person with knowledge as to the facts set forth in the petition. The presiding officer, in his discretion, may grant or deny such petition or may permit intervention by such persons limited to a particular stage of the proceeding.

Historic Deerfield has not seriously disputed the ALJ's finding that it has no knowledge that would be useful in resolving the misrepresentation issue specified against Happy Valley. Plainly, its intervention request is deficient in this regard. *See Western Connecticut Broadcasting Co.*, 38 FCC 2d 977 (1973); *Denton FM Radio, Ltd.*, 56 RR 2d 171, 172 (Rev. Bd. 1984).

5. As to the environmental issue, we observe that it is currently only a *contingent* or *potential* issue not yet ripe for adjudication. This is so because the issue, as framed by the Commission, first requires the issuance by the Commission (or Bureau) of an "adverse final environmental impact statement" *before* the ALJ may even consider whether the proposals "are consistent with the NEPA."

That is, a determination by the Commission's environmental processing staff that no adverse final environmental impact statement (FEIS) is warranted will moot the issue, and no environmental issue will remain to be tried at hearing. This procedure plainly follows the Commission's environmental processing rules. *See generally* Section 1.1301 *et seq.* of the Rules, 47 CFR §1.1301 *et seq.* In particular, at hearing, the ALJ (and the Board) are called upon to "utilize, . . . consider and assess" the FEIS in resolving any environmental issues. 47 CFR §1.1319(a), (b). In order to gauge whether to issue an FEIS, the Commission is concurrently considering the applicants' "environmental assessments," because the proposed facilities "may affect districts, sites, buildings, structures or objects . . . that are listed, or are eligible for listing, in the National Register of Historic Places." *See* 47 CFR §1.1307(a)(4).

6. Here, it is undisputed that the Commission is also considering information supplied by the state historical commission and by Historic Deerfield, as provided for by 47 CFR §1.1308(b). If the Commission makes a finding of "no significant impact," then "the application will be processed without further documentation of environmental effect." 47 CFR §1.1308(d). Otherwise (if the Commission finds a significant environmental impact), it will so notify the applicant, who "will then have an opportunity to amend the application so as to reduce, minimize or eliminate environmental problems." 47 CFR §1.1308(c). If the applicant cannot so amend, the Commission may undertake the preparation of a draft environmental impact statement (DEIS), consider public comments on the DEIS, and ultimately issue an FEIS. *See* 47 CFR §§1.1314-1.1317. Thus, Historic Deerfield's intervention request before the ALJ was (and remains) premature under 47 CFR 1.223, *supra*. According to the Commission's Environmental Rules and the literal wording of the designated environmental issue, no environmental issue is currently ripe for consideration at hearing. Our denial of the appeal is, of course, without prejudice to Historic Deerfield's right to refile an intervention request should the Commission issue a final environmental impact statement in this proceeding.

7. ACCORDINGLY, IT IS ORDERED, That the appeal filed on June 8, 1990 by Historic Deerfield, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-119

In re Applications of

SILVER SPRINGS COMMUNICATIONS	File No. BPH-870630MS
A. P. WALTER, JR.	File No. BPH-870630MU
SILVER SPRINGS RADIO COMMUNICATIONS, LTD.	File No. BPH-870630MW
SILVER RADIO PARTNERS	File No. BPH-870630MX

For Construction Permit for
New FM Broadcast Station, Channel 238A,
Silver Springs, Florida

MEMORANDUM OPINION AND ORDER

Adopted: July 25, 1990; Released: August 13, 1990

By the Review Board: MARINO (Chairman), and BLUMENTHAL. Board Member ESBENSEN not participating.

1. Before the Review Board is a "Joint Request for Approval of Settlement" filed by the captioned parties on July 19, 1990, in which Silver Springs Communications (SSC) proposes to settle this proceeding, and emerge as the permittee, by paying the remaining applicants certain sums in exchange for the dismissal of their respective applications. Specifically, SSC proposes to tender to A. P. Walter, Jr., the sum of $100,000; Silver Springs Radio Communications, Ltd., $175,000; and Silver Radio Partners, $40,000.

2. Pursuant to 47 CFR § 73.3525 (which implements 47 U.S.C. § 311(c), as amended), the parties have submitted executed copies of their respective settlement agreements, accompanied by the requisite declarations indicating that their applications were filed in good faith, and not for the purposes of reaching or carrying out a settlement agreement. The parties also indicate that the proposed settlement agreements will be in the public interest, that the approval thereof will conserve the resources of the Commission, and will expedite initiation of new FM broadcast service at Silver Springs, Florida. In light of the foregoing, we find no impediment to the amicable settlement of this proceeding.

3. ACCORDINGLY, IT IS ORDERED, That the Joint Request for Approval of Settlement filed by the captioned parties on July 19, 1990, IS GRANTED, and the settlement agreements ARE APPROVED; and,

4. IT IS FURTHER ORDERED, That the applications of A. P. Walter, Jr. (File No. BPH-870630MU), Silver Springs Radio Communications, Ltd. (File No. BPH-870630MW), and Silver Radio Partners (File No. BPH-870630MX), ARE DISMISSED with prejudice, and the application of Silver Springs Communications (File No. BPH-870630MS), for a new Class A FM facility at Silver Springs, Florida, IS GRANTED; and,

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-352

In re Applications of

CAPROCK EDUCATIONAL BROADCASTING FOUNDATION (hereafter "Caprock")	File No. BPED-880810MI
(Ronald E. Patterson & Cal E. Varner d/b/a) CAPITOL CITY BROADCASTING COMPANY (hereafter "Capitol")	File No. BPH-880812MZ
TWJ CORPORATION, INC. (hereafter "TWJ")	File No. BPH-880816MT
(Randolph Millar and Helen V. Millar d/b/a) LONGVIEW BROADCASTING COMPANY (hereafter "LBC")	File No. BPH-880816MZ
INGRAM & SCOTT COMMUNICATIONS LIMITED PARTNERSHIP (hereafter "Ingram")	File No. BPH-880816NZ
MATTHEW WILLIAMS (hereafter "Williams")	File No. BPH-880816OC
DELTA TELEVISION CORPORATION (hereafter "Delta")	File No. BPH-880816OK

For Construction Permit
for a New FM Station on Channel
247C2 (97.3 MHz) in Longview,
Texas

HEARING DESIGNATION ORDER

Adopted: July 24, 1990; Released: August 14, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Caprock.* The engineering data submitted by Caprock in its coverage map (Exhibit E-1) does not clearly demonstrate that it provides a 3.16 mV/m signal to the entire proposed city of license, as required by Section 73.315(a) of the Commission's Rules. The FM Branch does not require waiver of this requirement unless the proposed 3.16 mV/m coverage falls below 80% of the residential area of the principal community. *See John R. Hughes*, 50 Fed. Reg. 5679 (February 11, 1985). *See* also *Southwest Communications, Inc.*, released July 16, 1986 (Letter from the Chief, FM Branch, reference 8920-HVT). Since no waiver of this rule was requested, an issue will be specified.

3. Caprock proposes to sidemount its antenna on the existing KYKX (FM) tower. Our engineering study indicates that this proposal may significantly exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that Caprock may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of RF radiation exceeding specific standards. Since Caprock's proposal may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, it will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. This study must include the effects of FM Station KYKX. In this regard, if the site is presently fenced in compliance with the guidelines, Caprock is required to so state and give the distance from the base of the tower to the fence. Accordingly, Caprock will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

4. As indicated hereinabove, Caprock proposes to sidemount its antenna on the existing KYKX (FM) tower. The tower data submitted by Caprock is not consistent with that contained in the Commission's records for KYKX. Where Caprock states the tower's height above ground level as 243.8 meters, our Antenna Survey Branch records for KYKX list this height as 249.9 meters. Simi-

larly, Caprock's listed tower height above mean sea level (438.9 meters) differs slightly from that in our records for KYKX (445 meters). While this discrepancy does not affect the technical acceptability of Caprock's proposal, the applicant will be required to submit the appropriate amendment addressing this matter to the presiding Administrative Law Judge.

5. *LBC*. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. LBC has not completed Item 4 correctly, listing a post office box number as the residence address for principal Randolph Millar. Accordingly, LBC must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

6. Section 73.1125 of the Commission's Rules requires that the main studio of an FM station be located within the station's 3.16 mV/m (70 dBU) contour, but on a showing of good cause may be located outside that contour. In response to Section V-B, Item 12, which asks applicants to indicate with a "Yes" or "No" response whether their main studio would comply with this rule, LBC has indicated that the question does not apply. Since this response does not provide any indication of the location of LBC's main studio, an issue must be specified.

7. *Delta*. Although Delta certified in response to Section VI, Item 2 that it had "reasonable assurance, in good faith, that the site or structure proposed in Section V of [its application] as the location of its transmitting antenna, will be available to the applicant," it also noted on the form that it was "in the process of obtaining ownership of the site." This notation referenced the then-pending assignment proceeding (File No. BALCT-880728KQ), which proposed to assign the license and permit of KLMG-TV from KLMG-TV, Inc., Debtor-in-Possession, to KLMG-TV, Inc, the entity controlled by Delta, and stated that "[i]n the meantime, the Applicant is under contract as the manager of the site, and as such, possesses control of the site."

8. This representation is not sufficient. First, certification of reasonable assurance of the availability of the listed site must be obtained from either the owner of the site or the owner's agent. *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936, 19940-41 (1985). While Delta may have been the contracted manager of the KLMG site, it provided no documentation that it was authorized to act as the agent for the site's owner. Further, the referenced assignment application was returned August 18, 1988. Accordingly, no evidence exists supporting Delta's certification and an issue must therefore be specified.

9. *Other matters*. Attempts to obtain FAA clearance for Capitol and Williams through the Commission's Antenna Survey Branch and the applicants have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by both applicants would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

10. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301 and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although TWJ and Capitol filed such statements, each is deficient. TWJ's tendered application listed Herbert Wren as the designated person responsible for implementation of its Equal Employment Opportunity program. However, Mr. Wren was deleted as a party to the applicant in TWJ's December 16, 1988 amendment and no person and/or title was substituted as responsible for TWJ's EEO program implementation. Also, TWJ has not listed a readily identifiable women's organization to be utilized for recruitment purposes.[1] Capitol did not list any specific women's organization, stating that it would contact "Female and Minority Business and Professional Clubs" as well as "Female & Minority Civic and Honor Societies." Given the lack of specificity to this response, we are unable to determine that Capitol is aware of particular women's organizations to utilize for recruitment purposes. Accordingly, both TWJ and Capitol will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

11. The applicants below have petitioned for leave to amend their application on the dates show. The accompanying amendments were filed after December 19, 1988, the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
LBC	March 16, 1989; January 16, 1990
Ingram	January 23, February 6, April 3, August 23, September 15 and November 13, 1989
Delta	January 4 and March 15, 1989

12. Ingram petitioned for leave to amend its application on September 25, October 25 and November 7, 1989. The engineering amendments were filed after the last day for filing amendments as of right, and were accompanied by the good cause showing required by 47 C.F.R. §73.3522(a)(2). Consequently, the amendments are accepted for filing. However, an applicant may not improve its comparative advantage after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

13. Data submitted by the applicants indicate there would be significant difference in the size of the area and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

14. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

15. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Caprock's proposal would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section.

2. If a final environmental impact statement is issued with respect to Caprock in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

3. To determine whether LBC has proposed a location of its main studio in accordance with 47 C.F.R. § 73.1125.

4. To determine whether Delta has reasonable assurance that the transmitter site specified will be available to it.

5. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Capitol and Williams would constitute a hazard to air navigation.

6. To determine which of the proposals would, on a comparative basis, best serve the public interest.

7. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

16. IT IS FURTHER ORDERED, That in accordance with paragraph 3 hereinabove, Caprock shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

17. IT IS FURTHER ORDERED, That Caprock must submit an amendment resolving the discrepancy noted in paragraph 4 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

18. IT IS FURTHER ORDERED, That LBC shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

19. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

20. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, TWJ and Capitol shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

21. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by LBC, Ingram and Delta ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

22. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

23. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

24. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] TWJ lists "Kelly Girls" and "Jean Simpson," sources that are unfamiliar to the staff as women's organizations. In the event either or both would satisfy our requirements, TWJ may amend its EEO program to describe these listings.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 87-389

In the Matter of

Revision of Part 15 of the Rules regarding the operation of radio frequency devices without an individual license.

MEMORANDUM, OPINION AND ORDER

Adopted: July 9, 1990; Released: August 15, 1990

By the Commission:

1. By this action, the Commission grants in part the petition filed by the Senstar Corporation (Senstar) requesting reconsideration of the *First Report and Order* in this proceeding.[1] Specifically, we are permitting emissions from Part 15 non-licensed perimeter protection systems operating in the band 40.66-40.70 MHz to be measured using the methodology that was previously acceptable. This will allow such existing perimeter protection systems to continue to be marketed.

BACKGROUND

2. Part 15 of the Commission's rules governs the operation of radio frequency devices without an individual license. In the *First Report and Order*, the Commission adopted a comprehensive revision of these rules. The objective of this action was to encourage more effective use of the radio frequency spectrum while providing additional technical and operational flexibility in the design, manufacture and use of non-licensed devices.

3. In the *First Report and Order*, the Commission adopted rules which generally specify the use of measurement instrumentation with a CISPR quasi-peak detector for measurements of radio frequency (RF) emissions below 1000 MHz. The rationale for this specification was that such a detector provides a better indication of the interference potential of an emission than the previously-specified average detector. However, because CISPR quasi-peak measurements give higher readings for devices that employ pulsed emissions, the Commission was concerned that some devices permitted under the former rules would no longer be compliant.[2] Accordingly, the Commission took steps to compensate for the effect of the change in measurement procedures. For perimeter protection systems operating in the band 40.66-40.70 MHz, the Commission increased the emission limit 6 dB, from 50 uV/m at 30 meters to 1000 uV/m at 3 meters. In comments filed in response to the *Notice of Proposed Rule Making* [3] in this proceeding, Senstar had requested an even larger increase in the permitted field strength limit. However, this request was not adopted because there was no evidence that an increase in the emission limit above that proposed would not cause interference to authorized services.

THE SENSTAR PETITION

4. In its Petition for Reconsideration, Senstar maintains that emissions from its SENTRAX system, as measured by the CISPR quasi-peak method, will be 17 dB higher than if measured with an average detector. According to Senstar, the 6 dB increase in the emission limit provided in the new rules is therefore inadequate, and will force Senstar to cease to manufacture one of its product lines. Senstar feels this is unjustified since it has received no complaints of interference.

5. To correct this situation, Senstar proposes that the Commission allow perimeter protection systems to operate in the band 40.66-40.70 MHz under the increased field strength limit of 1000 uV/m at 3 meters, but measured with an average detector. Alternatively, Senstar proposes that the former field strength limit be increased by 18 dB, as measured with a CISPR quasi-peak detector. Senstar further requests that if neither of the above proposals is acceptable to the Commission, it be granted a ten-year period in which to comply with the rules adopted in this proceeding.

6. An opposition to Senstar's petition was filed by the Association of Maximum Service Telecasters (MST).[4] MST objects to any increase in the emission limit for perimeter protection systems and observes that no new information has been presented to demonstrate that interference will not occur if the limit is increased. MST also points out that by measuring average emissions, as opposed to CISPR quasi-peak emissions, manufacturers could increase the power of the transmitter by shortening the duty cycle of the signal and, thus, create high levels of peak emissions that could interfere with the authorized radio services.

DISCUSSION

7. As observed by MST, Senstar provides no new information to indicate that the potential for interference from Part 15 perimeter protection systems will not increase if the emission limit for those devices is raised further. We remain concerned that the potential for interference to authorized services would increase if we were to further relax the limit as Senstar requests. We therefore deny Senstar's proposals to further increase the emission limit.

8. At the same time, we seek to avoid any adverse impact of the new rules on perimeter protection systems operating in the 40.66-40.70 MHz band under the former rules, particularly as there has been no history of interference from these devices. Accordingly, we are adopting a modified version of Senstar's request for a ten-year grandfathering period by amending the rules to permit measurements using either an average detector with the former emission limit or a quasi-peak detector with the corresponding new limit. In addition, where measurements are made with an average detector, we are imposing a 20 dB peak-to-average limit on emissions from the system.[5] This will provide Senstar the relief it seeks and at the same time will control the interference potential associated with the peak signal levels of pulsed emissions. We see no need to limit this new policy to a ten-year period. As an editorial matter, the former limit has been

respecified in terms of a 3 meters distance rather than 30 meters for consistency with the format of other Part 15 requirements; however, measurements may be made at a distance up to 30 meters to avoid near-field measurement problems.

ORDERING CLAUSES

9. In accordance with the above discussion and pursuant to the authority contained in Sections 4(i), 301, 302, and 303 of the Communications Act of 1934, as amended, IT IS ORDERED that the Petition for Reconsideration filed by Senstar Corporation IS GRANTED to the extent herein and in all other respects IS DENIED. In addition, IT IS ORDERED that Part 15 of the Commission's Rules and Regulations IS AMENDED as set forth below. These rules and regulations are effective upon the date of their publication in the Federal Register.[6]

CHANGES TO THE REGULATIONS

Title 47 of the Code of Federal Regulations, Part 15 is amended to read as follows:

1. The authority citation for Part 15 continues to read as follows:

Authority: Sec. 4, 302, 303, 304, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303, 304, and 307.

2. Section 15.229 is amended by redesignating paragraphs (b) and (c) as paragraphs (c) and (d), respectively, and by adding a new paragraph (b), to read as follows:

Section 15.229 *Operation within the band 40.66 - 40.70 MHz.*

* * * * *

(b) As an alternative to the limit in paragraph (a), perimeter protection systems may demonstrate compliance with the following: the field strength of any emissions within this band shall not exceed 500 microvolts/meter at 3 meters, as determined using measurement instrumentation employing an average detector. The provisions in Section 15.35 for limiting peak emissions apply where compliance of these devices is demonstrated under this alternative emission limit.

* * * * *

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See First Report and Order*, GEN Docket No. 87-389, 4 FCC Rcd 3493 (1989). Unless otherwise stated, all of the references herein to the Part 15 regulations are to the rules adopted therein.

[2] The difference between the quasi-peak and average readings depends on the characteristics of the emission, i.e., the duty cycle of the RF signal. Pulsed transmissions with relatively long periods between pulses tend to produce average readings that are much lower than quasi-peak readings.

[3] *See Notice of Proposed Rulemaking* in GEN Docket No. 87-389, 2 FCC Rcd 6135 (1987).

[4] Control Data Canada, Ltd. (CDC) filed comments on Senstar's petition but later withdrew the comments by letter dated February 12, 1990.

[5] This 20 dB peak-to-average limit is contained in Section 15.35 and is applicable to all devices measured using an average detector. *See* 47 CFR Section 15.35.

[6] In accordance with 5 U.S.C. 553(d), publication of the amended regulations in the Federal Register at least 30 days before the effective date is not required since the changes to the regulations relieve existing restrictions.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-373

In the Matter of

Amendment of Section 73.202(b), RM-7287
Table of Allotments,
FM Broadcast Stations.
(Cusseta, Georgia)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 6, 1990; Released: August 15, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Gary P. Albarez (petitioner), requesting the allotment of Channel 267A to Cusseta, Georgia, as the community's first local FM service. Petitioner states his intention to apply for the channel, if allotted.

2. Channel 267A can be allotted to Cusseta in compliance with the Commission's minimum distance separation requirements with a site restriction at least 9 kilometers (5.6 miles) west of the community[1] to avoid short-spacings to Channel 267C2, Chauncey, Georgia,[2] a vacant allotment for which three applications are pending, [3] as well as a proposal to allot Channel 266A to Hannahs Mill, Georgia, in MM Docket No. 89-547.[4]

3. We believe the public interest would be served by proposing the allotment of Channel 267A to Cusseta, Georgia, as the community's first local FM service. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Cusseta, Georgia	--	267A

4. IT IS ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the applicants for Channel 267C2 at Chauncey, Georgia, as follows:

Chauncey Broadcasting, Inc.
P.O. Box 157
Eastman, Georgia 31023

William A. Culpepper
227 Farr's Bridge Rd.
Greenville, South Carolina 29611

Heart of Dixie Broadcasting
600 Anson Avenue
Eastman, Georgia 31023

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **October 9, 1990,** and reply comments on or before **October 24, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Mark Ryland, Esq.
Latham & Watkins
1001 Pennsylvania Ave., N.W.
Suite 1300
Washington, D.C. 20004

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The proposed coordinates for Channel 267A at Cusseta are North Latitude 32-19-11 and West Longitude 84-52-07.

[2] Coordinates for Channel 267C2 at Chauncey are 32-16-03 and 83-06-26.

[3] The applicants for Channel 267C2 at Chauncey are Chauncey Broadcasting, Inc. (BPH-891206MI), William A. Culpepper (BPH-891206MF), and Heart of Dixie Broadcasting (BPH-891204MK). The site restriction required to accommodate requested Channel 267A at Cusseta meets the spacing requirements at the reference coordinates only for Channel 267C2 at Chauncey. However, it is well established Commission policy that rule making proposals which provide public service benefits are generally preferred over applications which represent a preference for particular sites. *See Andalusia, AL,* 49 FR 32201, August 13, 1984, *Las Vegas, NV,* 51 FR 9453, March 19, 1986. Therefore, a copy of this *Notice* will be served on the applicants at Chauncey to advise them that they may be required to amend their applications to specify non-conflicting sites, in the event Channel 267A is ultimately allotted to Cusseta.

[4] *See* 4 FCC Rcd 8455 (1989). Coordinates for Channel 266A at Hannahs Mill, Georgia, are 32-51-49 and 84-25-10.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-372

In the Matter of

Amendment of Section 73.202(b),	RM-7300
Table of Allotments,	
FM Broadcast Stations.	
(Spokane, Washington)	

NOTICE OF PROPOSED RULE MAKING

Adopted: August 6, 1990; Released: August 15, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Pacific Metrocom Northwest, Inc. (petitioner), seeking the substitution of Channel 280C2 for Channel 280A at Spokane, Washington, and the modification of its license for Station KVXO(FM) to specify operation on the higher powered channel.[1] Petitioner states that it will apply for the channel, if allotted.

2. Channel 280C2 can be substituted for Channel 280C3 at Spokane in compliance with the Commission's minimum distance separation requirements with a site restriction of 11.7 kilometers (7.3 miles) southeast of the city.[2] Canadian concurrence is required since Spokane is located within 320 kilometers (200 miles) of the U.S. - Canadian border.

3. We shall propose to modify the license of Station KVXO(FM) at Spokane to specify operation on Channel 280C2 in lieu of Channel 280C3, as requested, in accordance with Section 1.420(g) of the Commission's Rules. Accordingly, we shall not accept competing expressions of interest or require that the petitioner demonstrate the availability of an additional equivalent channel at Spokane.

4. The Commission believes that it would be in the public interest to propose the substitution of Channel 280C2 for Channel 280C3 at Spokane, Washington, since it could enable Station KVXO(FM) to expand its coverage area. Accordingly, we seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Spokane, Washington	225C, 229C, 245A, 251C, 255C, 260C, 280C3, 284A, 289C, 300C.	225C, 229C, 245A, 251C, 255C, 260C, 280C2, 284A, 289C, 300C.

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **October 9, 1990,** and reply comments on or before **October 24, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Pacific Metrocom Northwest, Inc.	Contemporary Communications Broadcast Consultants
289 Key Palm Road	Post Office Box 159
Boca Raton, Fl. 33432	Fayetteville, Georgia 30214
(Petitioner)	(Consultant to petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Andrew J. Rhodes, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Station KVXO was upgraded from Channel 280A to Channel 280C3 by *Report and Order* in MM Docket 89-260, 5 FCC Rcd 2152, 2168 (1990).

[2] The coordinates for this allotment are North Latitude 47-35-42 and West Longitude 117-17-53.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-371

In the Matter of

Amendment of Section 73.202(b), RM-7215
Table of Allotments,
FM Broadcast Stations.
(Exmore, Virginia)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 6, 1990; Released: August 15, 1990

By the Deputy Chief, Policy and Rules Division:

1. At the request of Seashore Broadcasting Company (petitioner), permittee of Channel 291A, Exmore, Virginia, the Commission considers herein a petition for rule making proposing the substitution of Channel 291B1 for Channel 291A at Exmore, and the modification of its construction permit (BPH-880324MP) for Station WPHG(FM) to specify operation on Channel 291B1.

2. The allotment of Channel 291B1 can be made in compliance with the Commission's minimum distance separation requirements at the site specified by the petitioner which is located 2.5 kilometers (1.6 miles) north of the community.[1]

3. As requested, we shall propose to modify the construction permit for Station WPHG(FM) to specify operation on Channel 291B1 in lieu of Channel 291A in accordance with Section 1.420(g) of the Commission's Rules. Therefore, we shall not accept competing expressions of interest or require the petitioner to demonstrate the availability of an additional equivalent channel at Exmore.

4. In view of the fact that Station WPHG(FM) could expand its coverage area, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Exmore, Virginia	291A, 298B	291B1, 298B

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **October 9, 1990,** and reply comments on or before **October 24, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Harry C. Martin
Troy F. Tanner
Reddy, Begley & Martin
2033 M Street, N.W.
Washington, D.C. 20036

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Andrew J. Rhodes, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 291B1 at Exmore, Virginia, are 37-33-15 and 75-49-38.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-398

In the Matter of

Amendment of Section 73.202(b), RM-6819
Table of Allotments,
FM Broadcast Stations.
(Spring City, Tennessee)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 6, 1990; Released: August 15, 1990

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, for Channel 230A at Spring City, Tennessee, and the modification of the construction permit of Walter E. Hooper III (petitioner) for Station WAYA(FM) to specify operation on the higher powered channel. Petitioner filed comments and reply comments reiterating its intention to apply for Channel 230C3, if allotted. No other comments were received.

2. As stated in the *Notice*, Channel 230C3 can be allotted to Spring City in compliance with the Commission's minimum distance separation requirements at the petitioner's specified site of 21.1 kilometers (13.1 miles) southeast of the city.[1]

3. We believe the public interest would be served by substituting Channel 230C3 for Channel 230A at Spring City, since it could provide the community with its first expanded FM service. As proposed, we will also modify petitioner's construction permit for Station WAYA(FM), Spring City, to specify operation on Channel 230C3 in accordance with Section 1.420(g) of the Commission's Rules.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 1, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Spring City, Tennessee	230C3

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Station WAYA(FM) IS MODIFIED, effective **October 1, 1990,** to specify operation on Channel 286C3 in lieu of Channel 285A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Andrew J. Rhodes, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The restricted site coordinates for Channel 230C3 at Spring City, Tennessee, are 35-33-06 and 84-42-09. Because this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, the permittee may avail himself of the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-421

In the Matter of

Amendment of Section 73.202(b), RM-6853
Table of Allotments,
FM Broadcast Stations.
(Idalou, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 6, 1990; Released: August 15, 1990

By the Deputy Chief, Policy and Rules Division:

1. Pursuant to the request of Express Communications (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 7081 (1989), proposing the allotment of Channel 289A to Idalou, Texas, as that community's first local FM service. Petitioner filed supporting comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 289A to Idalou, Texas, since it could provide the community with its first local FM service. The channel can be allotted to Idalou in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 1, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Idalou, Texas	289A

4. The window period for filing applications will open on **October 2, 1990,** and close on **November 1, 1990.**

5. IT IS ORDERED, That the Secretary of the Commission SHALL SEND A COPY of this *Order* BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED to the following: Barton Broadcasting Company, 4319 57th Street, Lubbock, TX 79413.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Andrew J. Rhodes, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 289A at Idalou, Texas, are North Latitude 33-39-48 and West Longitude 101-40-42. Because the petition which resulted in this allotment was filed prior to October 2, 1989, applicants may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* 47 CFR §73.213(c).

We recognize that the reference coordinates for Channel 289A at Idalou conflict with the present operation of Station KEJS, Channel 292A, Lubbock, Texas. However, Station KEJS' construction permit was modified to specify operation on Channel 293C2 pursuant to the *Report and Order* in MM Docket 87-534, effective December 5, 1988. *See* 53 FR 43440, October 27, 1988. Station KEJS has pending before the Commission an application to modify its construction permit to specify operation on Channel 293C2 (BMPH-891106IH). We will, therefore, serve Station KEJS with a copy of this *Report and Order*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-341

In the Matter of

Amendment of Section 73.202(b), RM-6775
Table of Allotments,
FM Broadcast Stations.
(Warrenton, North Carolina, and
Alberta, Virginia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 6, 1990; Released: August 15, 1990

By the Deputy Chief, Policy and Rules Division:

1. At the request of Warrenton Broadcasting Corporation (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 6184 (1989), proposing the substitution of Channel 297C2 for Channel 297A at Warrenton, North Carolina, the modification of its construction permit for Station WVRS(FM) to specify the higher powered channel, and the substitution of Channel 276A for Channel 299A at Alberta, Virginia. Petitioner filed comments reiterating its intention to apply for Channel 297C2, if allotted to Warrenton. In addition, petitioner states that it is under common ownership with FM 108 Corporation, the permittee of Station WGNJ on Channel 299A at Alberta. As such, it represents that the permittee has no objection to the proposed substitution of channels.[1] No other comments were received.

2. We believe the public interest would be served by substituting Channel 297C2 for Channel 297A at Warrenton, North Carolina, since it could enable Station WVRS(FM) to expand its coverage area. Channel 297C2 can be allotted to Warrenton in compliance with the Commission's minimum distance separation requirements with a site restriction of 29.3 kilometers (18.2 miles) northeast to avoid a short-spacing to Station WFXC, Channel 296A, Durham, North Carolina, and to the pending application of Station WKZL, Channel 298C, Winston-Salem, North Carolina. Channel 276A can be allotted to Alberta, Virginia, in compliance with the Commission's minimum distance separation requirements and can be used at the transmitter site specified in Station WGNJ's construction permit.[2]

3. As proposed in the *Notice*, we will modify petitioner's construction permit for Station WVRS(FM) to specify operation on Channel 297C2 at Warrenton. In addition, we will also modify Station WGNJ's construction permit to specify Channel 276A at Alberta, Virginia.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 1, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Warrenton, North Carolina	297C2
Alberta, Virginia	276A

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Warrenton Broadcasting Corporation for Station WVRS, Warrenton, North Carolina, IS MODIFIED to specify operation on Channel 297C2, in lieu of Channel 297A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Station WGNJ, Alberta, Virginia, IS MODIFIED to specify operation on Channel 276A in lieu of Channel 299A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WGNJ's construction permit, BPH-880531NC, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with construction permit BPH-880531NC, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

7. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the permittee of Station WGNJ, as follows: Alvin R. Rooks, Sr., 4018 County Street, Portsmouth, Virginia 23707.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] On June 9, 1989, the Commission granted FM 108 Corporation's application for a construction permit. On January 31, 1990, the Commission granted FM 108 Corporation's request for assignment of its construction permit to Alvin R. Rooks, Sr. The assignment was consummated on February 15, 1990. Rooks states that he concurs in the modification of Station WGNJ's construction permit to specify operation on Channel 276A.

[2] The coordinates for Channel 297C2 at Warrenton are North Latitude 36-34-11 and West Longitude 77-54-16. The coordinates for Channel 276A at Alberta are North Latitude 36-53-39 and West Longitude 77-53-36.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-446

In the Matter of

Amendment of Section 73.202(b), RM-6834
Table of Allotments,
FM Broadcast Stations.
(Trenton, Tennessee)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 26, 1990; Released: August 15, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 7483 (1989), issued in response to a petition filed by The Wireless Group, Inc., (petitioner) licensee of Station WLOT(FM), Channel 249A at Trenton, Tennessee, proposing the substitution of Channel 248C3 for Channel 249A at Trenton, and the modification of the license for Station WLOT(FM) to specify operation on Channel 248C3. Petitioner filed supporting comments restating its intention to apply for the channel, if allotted.

2. We believe the public interest would be served by substituting Channel 248C3 for Channel 249A at Trenton, Tennessee, providing that community with its first wide coverage area FM service. Channel 248C3 can be allotted at Trenton in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.9 kilometers (6.8 miles) north of the city.[1]

3. As requested, we are modifying the license of Station WLOT(FM) to specify operation on Channel 248C3 in accordance with Section 1.420(g) of the Commission's Rules.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 1, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Trenton, Tennessee	248C3

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WLOT(FM), IS MODIFIED, to specify operation on Channel 248C3 in lieu of Channel 249A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 248C3 at Trenton, Tennessee, are 36-04-30 and 88-56-00. Because this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, the licensee may avail itself of the provisions of Section 73.213(c)(1) of the Commission's rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-492

In the Matter of

Amendment of Section 73.202(b),	RM-6900
Table of Allotments,	RM-7271
FM Broadcast Stations.	
(Detroit Lakes and Bagley,[1]	
Minnesota)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 1, 1990; Released: August 15, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 8085 (1989), proposing the allotment of FM Channel 272C2 to Detroit Lakes, Minnesota. The *Notice* was issued in response to a petition filed by Robert D. Spilman (petitioner). In response to the *Notice*, petitioner filed comments withdrawing his interest in the proposal for Detroit Lakes, Minnesota. James Ingstad (Ingstad) filed a counterproposal requesting the allotment of Channel 272C2 to Bagley, Minnesota, as that community's first FM broadcast service.[2] On May 3, 1990, Ingstad filed comments requesting the dismissal of his counterproposal.

2. The Commission did not receive supporting comments for the allotment of Channel 272C2 at Detroit Lakes or Bagley, Minnesota, and consistent with the policies and procedures set forth in the Appendix to the *Notice*, we shall dismiss the petition to allot an FM Channel to Detroit Lakes, Minnesota, and the counterproposal to allot a channel to Bagley, Minnesota.

3. In view of the foregoing, IT IS ORDERED, That the petition of Robert D. Spilman (RM-6900), proposing the allotment of Channel 272C2 to Detroit Lakes, Minnesota, IS HEREBY DISMISSED.

4. IT IS FURTHER ORDERED, that counterproposal filed by James Ingstad (RM-7271), requesting the allotment of FM Channel 272C2 to Bagley, Minnesota, IS HEREBY DISMISSED.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Bagley has been added to the caption.

[2] Public Notice of the counterproposal was given on February 6, 1990, Report No. 1807 (RM-7271).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-425

In the Matter of

Amendment of Section 73.202(b), RM-6829
Table of Allotments,
FM Broadcast Stations.
(Rome, Georgia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 1, 1990; Released: August 15, 1990

By the Deputy Chief, Policy and Rules Division:

1. Pursuant to the request of Briar Creek Broadcasting Corp. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 7089 (1989), proposing the substitution of Channel 249C3 for Channel 249A at Rome, Georgia, and the modification of its license for Station WKCX(FM) to specify operation on the higher powered channel. Petitioner filed comments restating its intention to apply for Channel 249C3, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 249C3 for Channel 249A at Rome, Georgia, since it could provide Station WKCX(FM) with an expanded coverage area. Channel 249C3 can be allotted to Rome in compliance with the Commission's minimum distance separation requirements with a site restriction of 13.5 kilometers (8.4 miles) northeast to avoid a short-spacing to Station WKLD, Channel 249A, Oneonta, Alabama.[1] In accordance with Section 1.420(g) of the Commission's Rules, we are herein modifying the license of Station WKCX to specify operation on Channel 249C3.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 1, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Rome, Georgia	249C3, 272A

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WKCX(FM), Rome, Georgia, IS MODIFIED, to specify operation on Channel 249C3 in lieu of Channel 249A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 34-20-00 and West Longitude 85-03-00. Because the petition for rule making in this proceeding was filed prior to October 2, 1989, the licensee may avail itself of the provisions *See* 47 C.F.R. § 73-213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-442

In the Matter of

Amendment of Section 73.202(b), RM-6837
Table of Allotments,
FM Broadcast Stations.
(Roanoke, Alabama)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 1, 1990; Released: August 15, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 4 FCC Rcd 7473 (1989), issued in response to a petition filed on behalf of Eagle's Nest, Inc. (petitioner), permittee of Station WELR-FM,[1] Channel 272A, Roanoke, Alabama, proposing the substitution of Channel 272C3 for Channel 272A, and modification of its permit to specify operation on the higher-powered channel. Petitioner filed comments in support of the proposal. No other comments were received.

2. As indicated in the *Notice*, Channel 272C3 can be allotted to Roanoke, Alabama, at the petitioner's suggested site 17.6 kilometers (10.9 miles) south[2] of the community consistent with the minimum distance separation requirements of the Commission's Rules. [3]

3. In view of the above, we believe the public interest would be served by substituting Channel 272C3 for Channel 272A at Roanoke, Alabama, since it could provide the first expanded coverage FM service to the community. Therefore, and in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying the permit of Station WELR-FM to specify operation on Channel 272C3 in lieu of Channel 272A, as requested.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 1, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Roanoke, Alabama	272C3

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the permit issued to Eagle's Nest, Inc. for Station WELR-FM, Roanoke, Alabama, IS MODIFIED effective **October 1, 1990,** to specify operation on Channel 272C3 in lieu of Channel 272A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Petitioner's proposal, as well as the *Notice* herein, and comments in response thereto, incorrectly referred to the petitioner as the "licensee" of Station WELR-FM rather than denoting its actual status as the "permittee" of the facility. *See* File No. BPH-890714IB.

[2] Use of the petitioner's suggested site for Channel 272C3 at Roanoke at coordinates 33-00-00 and 85-26-00 avoids a conflict with Station WQTU(FM), Channel 272A, Rome, Georgia, which is licensed at coordinates 34-14-02 and 85-13-50.

[3] Because this allotment may be made as a result of a petition for rule making filed prior to October 2, 1989, the permittee may avail itself of the provisions of Section 73.213(c)(1) of the Commission's rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-370

In the Matter of

Amendment of Section 73.202(b), RM-6842
Table of Allotments,
FM Broadcast Stations.
(Wadesboro, North Carolina)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 1, 1990; Released: August 15, 1990

By the Deputy Chief, Policy and Rules Division:

1. At the request of Red Penny Broadcasting (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 6639 (1989), proposing the substitution of Channel 228C3 for Channel 228A at Wadesboro, North Carolina, and the modification of its construction permit for Station WRPL to specify operation on the higher powered channel. Petitioner filed comments reiterating its intention to apply for Channel 228C3, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 228C3 for Channel 228A at Wadesboro, since it could enable Station WRPL to expand its coverage area. As proposed, we will also modify petitioner's construction permit to specify operation on Channel 228C3. Channel 228C3 can be allotted to Wadesboro in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.9 kilometers (3.1 miles) northeast to avoid a short-spacing to Stations WZNS, Channel 225C, Dillon, South Carolina, and WCEZ, Channel 228A, Columbia, South Carolina, and to an application for Channel 229A at Bishopville, South Carolina (BPH-880519ND).[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 1, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Wadesboro, North Carolina	228C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Red Penny Broadcasting for Station WRPL, Wadesboro, North Carolina, IS MODIFIED to specify operation on Channel 228C3, in lieu of Channel 228A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 34-59-57 and West Longitude 80-02-34. Because the petition which resulted in this allotment was filed prior to October 2, 1989, the petitioner may avail itself of the provisions of Section 73.213(c)(1) of the Commission's rules. *See* 47 CFR §73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-36

In the Matter of

Amendment of Section 73.202(b),	RM-6551
Table of Allotments,	RM-6771
FM Broadcast Stations.	
(Cameron and Savannah,	
Missouri)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: July 26, 1990; Released: August 13, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it a Petition for Reconsideration[1] filed by Cameron Radio, Inc. (Cameron Radio), of the *Report and Order*, 4 FCC Rcd 7842 (1989), allotting Channel 224C2 to Savannah, Missouri.

2. Cameron Radio petitioned the Commission to reconsider the allotment of Channel 224C2 to Savannah, Missouri, and the rejection of its mutually exclusive counterproposal. In particular, Cameron Radio requested the substitution of Channel 225C2 for Channel 222A at Cameron, Missouri, and modification of the construction permit for Channel 222A to specify operation on Channel 225C2. Cameron Radio has filed comments requesting the withdrawal and dismissal of its Petition for Reconsideration.

3. In view of the foregoing, IT IS ORDERED, That the Petition of Cameron Radio, Inc. IS HEREBY DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Public Notice was given on December 14, 1989, Report No. 1803.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-376

In the Matter of

Amendment of the Commission's Rules
to improve the quality of the AM
Broadcast Service by reducing
adjacent channel interference and by
eliminating restrictions pertaining
to the protected daytime contour.

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: August 3, 1990; Released: August 16, 1990

By the Chief, Mass Media Bureau:

1. On July 20, 1988 the Commission adopted a *Notice of Proposed Rule Making* [1] in this docket which proposed revision of Part 73 rules relating to adjacent-channel emissions (§73.44) and "first service" provisions (§73.37(b)) for AM broadcast stations. This proceeding was an outgrowth of the *Notice of Inquiry* in MM Docket No. 87-267[2], which initiated a comprehensive review of the Commission's AM broadcast assignment criteria and related matters. A *First Report and Order* [3] imposing a new emission limitation for AM stations was adopted on April 12, 1989. At that time, the Commission indicated that it would treat the unresolved §73.37(b) proposal[4] in a subsequent *Second Report and Order*.

2. Since these actions the Commission has held an *en banc* hearing on ways to revitalize the AM service. Subsequently, the Commission has adopted a *Notice of Proposed Rule Making* [5] in MM Docket No. 87-267, setting forth a comprehensive strategy to restore the AM service. Related proposals made in the Docket No. 87-267 *Notice*, which deals broadly with protected contours and signal protection ratios, now appear to be the more appropriate means of resolving the limited contour protection proposal raised in this proceeding. Accordingly, when it adopted the Docket No. 87-267 *Notice*, the Commission instructed the staff to take no further action on the original §73.37(b) proposal and to terminate Docket No. 88-376.

3. Accordingly, pursuant to the authority delegated to the staff by the *Notice of Proposed Rule Making* in MM Docket No. 87-267, para. 23, MM Docket No. 88-376 IS TERMINATED.

4. For further information concerning this matter, contact Steven D. Selwyn, Mass Media Burea. (202) 632-9660.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

FOOTNOTES

[1] *See Notice of Proposed Rule Making*, MM Docket No. 88-376, 3 FCC Rcd. 5687 (1988), summarized at 53 FR 36870 (1988).

[2] *See Notice of Inquiry, Review of Technical Assignment Criteria for the AM Broadcast Service*, MM Docket No. 87-267, FCC 87-245, adopted July 16, 1987, released August 17, 1987, 2 FCC Rcd 5014 (1987), 52 FR 31975, August 24, 1987.

[3] *See First Report and Order*, MM Docket No. 88-376, 4 FCC Rcd 3835 (1989).

[4] The Commission proposed to amend §73.37(b) of its rules to allow AM applicants to accept some service contour overlap. Under this proposal, applicants for new or modified AM facilities could elect to protect their 1.0 mV/m daytime contour rather than the traditional 0.5 mV/m daytime contour, provided they fully protect all other stations.

[5] *See Notice of Proposed Rule Making*, MM Docket No. 87-267, FCC 90-136, adopted April 12, 1990.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-509

In the Matter of

Enhanced Nighttime Operations
For Class II-S and III-S
AM Radio Broadcast Stations

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: August 3, 1990; Released: August 16, 1990

By the Chief, Mass Media Bureau:

1. On October 13, 1988, the Commission adopted a *Notice of Proposed Rule Making* [1] (" *Notice* ") in this docket that proposed rule amendments intended to enhance nighttime operations by Class II-S and Class III-S AM stations. This proposal, part of the Commission's effort to revitalize the AM broadcasting service, was a continuation of the process begun with the Commission's 1983 action first authorizing post-sunset operation by daytime-only stations[2]. The *Notice* proposed to allow Class II-S and Class III-S stations to establish a separate nighttime antenna system without having to meet the minimum power, city coverage or minimum operating schedule requirements that otherwise would apply to such a change in their nighttime operations.

2. Since the release of the *Notice*, the Commission has held an *en banc* hearing on ways to revitalize the AM service. Subsequently, the Commission has adopted a *Notice of Proposed Rule Making* [3] in MM Docket No. 87-267, setting forth a comprehensive strategy to restore the AM service. Because the proposals made in the *Notice* are related to and dependent upon policies more recently proposed in the MM Docket No. 87-267 *Notice of Proposed Rule Making*, the Commission instructed the staff to incorporate the record developed in MM Docket No. 88-509 into MM Docket No. 87-267 and to terminate the former.

3. Accordingly, pursuant to the authority delegated to the staff by the *Notice of Proposed Rule Making* in MM Docket No. 87-267, para. 24, MM Docket No. 88-509 IS TERMINATED.

4. For further information concerning this proceeding, contact Steven D. Selwyn, Mass Media Burea. (202) 632-9660.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

FOOTNOTES

[1] *See Notice of Proposed Rule Making, Enhanced Nighttime Operation for Class II-S and III-S AM Stations*, MM Docket No. 88-509, 3 FCC Rcd 6444 (1988).

[2] *See First Report and Order, Hours of Operation of Daytime-Only Stations*, BC Docket No. 82-538, 95 FCC 2d 1032 (1983).

[3] *See Notice of Proposed Rule Making*, MM Docket No. 87-267, FCC 90-136, adopted April 12, 1990.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-511

In the Matter of

Review of the Methods for Calculating
Nighttime Protection for Stations
In the AM Broadcasting Service

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: August 3, 1990; Released: August 16, 1990

By the Chief, Mass Media Bureau:

1. On October 13, 1988 the Commission adopted a *Notice of Proposed Rule Making* [1] (" *Notice* ") in this docket that proposed to revise the procedure for calculating the nighttime protection levels afforded stations in the AM broadcasting service. The Commission proposed to modify the rules which relate to the calculation of nighttime RSS (root-sum-square) skywave interference levels. Consideration was also given to including adjacent channel skywave signals in such calculations.

2. Since the release of the *Notice*, the Commission has held an *en banc* hearing on ways to revitalize the AM service. Subsequently, the Commission adopted a *Notice of Proposed Rule Making* [2] in MM Docket No. 87-267, which sets forth a comprehensive strategy to restore the AM service. Since the proposals given in the *Notice* in the above-captioned matter are closely related to proposals made in the MM Docket No. 87-267 *Notice of Proposed Rule Making*, the Commission instructed the staff to incorporate the record developed in MM Docket No. 88-511 into MM Docket No. 87-267 and to terminate the former.

3. Accordingly, pursuant to the authority delegated to the staff by the *Notice of Proposed Rule Making* in MM Docket No. 87-267, para. 25, MM Docket No. 88-511 IS TERMINATED.

4. For further information concerning this proceeding, contact Steven D. Selwyn, Mass Media Burea. (202) 632-9660.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

FOOTNOTES

[1] *See Notice of Proposed Rule Making*, MM Docket No. 88-511, 3 FCC Rcd 6448 (1988), summarized at 53 FR 47235, November 22, 1988.

[2] *See Notice of Proposed Rule Making*, MM Docket No. 87-267, FCC 90-136, adopted April 12, 1990.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-555

In re Application of

HAWTHORNE FM PARTNERSHIP — File No. BPH-881122MO

For Construction Permit for a
New FM Station on Channel 228A
in Hawthorne, Nevada

Appearances

Barbara L. Waite, Esquire, on behalf of Hawthorne FM Partnership and *Larry A. Miller, Esquire*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

SUMMARY DECISION OF CHIEF ADMINISTRATIVE LAW JUDGE JOSEPH STIRMER

Issued: August 8, 1990; Released: August 16, 1990

PRELIMINARY STATEMENT

1. By *Hearing Designation Order* (DA 89-1494) released December 28, 1989, the application of Hawthorne FM Partnership (Hawthorne) was designated for hearing on the following issues:

> 1. To determine whether Sonrise Management Services, Inc., is an undisclosed party to the application of Hawthorne.
>
> 2. To determine whether Hawthorne's organizational structure is a sham.
>
> 3. To determine whether Hawthorne violated Section 1.65 of the Commission's Rules, and/or lacked candor, by failing to report the designation of character issues against other applicants in which one or more of its partners has an ownership interest and/or the dismissal of such ownership interest and/or the dismissal of such applications with unresolved character issues pending.
>
> 4. To determine, from the evidence adduced pursuant to Issues 1 through 3 above, whether Hawthorne possesses the basic qualifications to be a licensee of the facilities sought herein.

2. Issues 1 and 2 were resolved in favor of Hawthorne by summary decision in a *Memorandum Opinion and Order*, FCC 90M-553, released March 20, 1990. Hawthorne seeks summary decision on the remaining issues. This request follows discovery during which Hawthorne produced various documents requested by the Bureau and made available two of its principals, Victoria P. Stuart and Gary A. Simpson, for deposition by the Bureau.

3. A prehearing conference was held March 6, 1990.

4. Presently under consideration are a "Motion for Summary Decision" filed by Hawthorne FM Partnership on May 2, 1990, and the "Mass Media Bureau's Comments in Support of Motion for Summary Decision" filed by the Bureau on May 16, 1990. Hawthorne filed a "Supplement to Motion for Summary Decision" on July 30, 1990.

FINDINGS OF FACT

5. In 1986 and early 1987, Gary A. Simpson, a partner of Hawthorne, became a partner in seven potential applicants for FM construction permits. Although it was Mr. Simpson's understanding that his interest in these applicants was to be that of a limited partner, the applicants were initially organized as general partnerships. (Deposition of Gary A. Simpson, pp. 29-30 [hereafter Simpson Deposition].) Mr. Simpson invested in these partnerships as a result of attending meetings held by representatives of Sonrise Management Services, Inc. (Sonrise). (*Id.*, pp. 7-10); he himself had no prior experience in broadcasting and had never before participated in a broadcast application. (*Id.*, pp. 35-36.)

6. Mr. Simpson was not kept informed regarding the status of these investments on an organized basis nor was he provided copies of relevant documents. (Simpson Deposition, pp. 12-22.) It was his understanding that the general partnerships were being reformed into limited partnerships, and, in due course, he would receive such paperwork in this connection as might be necessary for him to sign. (*Id.*, p. 38.) It was Mr. Simpson's understanding that a limited partnership could be legally established by the execution of a limited partnership agreement between one general partner and a single limited partner, and that, sooner or later, the remaining limited partners would "catch up" with the paperwork. (*Id.*, pp. 37-38.) On occasion, he spoke with certain of the general partners of the applicants in an effort to ascertain the status of these applications but was generally unsuccessful in obtaining much information. (*Id.*, pp. 20-21.)

OLIVER SPRINGS, TENNESSEE, AND PAT STUART

7. One of the general partners with whom Simpson spoke was Victoria Patricia (Pat) Stuart, a general partner in the limited partnership which was the applicant for the Oliver Springs, Tennessee, channel in which Mr. Simpson had also invested. (Simpson Deposition, pp. 16-18.) Ms. Stuart, also a partner in Hawthorne FM Partnership, was approached by Sonrise regarding participating in an application for an FM construction permit as a general partner of a limited partnership due to her experience in broadcasting.[1] (Deposition of Victoria Patricia Stuart, pp. 8-9 [hereafter Stuart Deposition].) She was asked to participate specifically in the Oliver Springs application after the previous general partner had withdrawn from the partnership. (*Id.*)

8. Ms. Stuart agreed and traveled to Washington, D.C., to meet with Mr. Thomas L. Root, the Oliver Springs applicant's communications counsel. (Stuart Deposition, pp. 10-11, 15, 23-25.) Mr. Root prepared an amendment

to the application, which Ms. Stuart signed, indicating that the applicant was a limited partnership and that Ms. Stuart and a Mr. Gary "L." Simpson were general partners. (*Id.*, pp. 23-25.) This amendment, dated March 16, 1987, reflects the approximate date of Ms. Stuart's involvement in this application; she was not involved in preparing the application for filing. (*Id.*, pp. 23, 30.)

9. Ms. Stuart telephoned Mr. Simpson shortly after accepting the role of general partner of this applicant under the belief that Mr. Simpson was the "co-general partner" in this partnership. (Stuart Deposition, p. 26.) Mr. Root had explained to her that, as she was not a party to the original application, it would be necessary for a second general partner who had been a party to the application from the beginning to be named as holding majority control. (*Id.*, pp. 10-11.) Therefore, when she reviewed the application which contained a list of principals of the applicant (prior to consulting with the other general partner of the applicant), she observed that there was only one "Gary Simpson" on the list, so she telephoned Gary A. Simpson. (*Id.*, pp. 25-26.)

10. Mr. Simpson was surprised to learn that his name appeared on the amendment as a general partner. (Stuart Deposition, p. 26.) He did not pursue the matter with either Sonrise representatives or Mr. Root, assuming that nothing could be valid without his having agreed to it or signing something, and that Ms. Stuart had simply made a mistake. (Simpson Deposition, pp. 16-19.) Mr. Simpson had never been contacted regarding being a general partner in the limited partnership formed for this application by either Mr. Root or Sonrise. (*Id.*, p. 18.) When he later saw a copy of the amendment, he immediately noticed that the amendment stated that the general partner was Gary "L." Simpson, not Gary A. Simpson. (*Id.*, pp. 36-37.)

11. Nevertheless, Ms. Stuart and Mr. Simpson discovered a common interest in broadcast ownership and remained in contact by telephone thereafter. (Stuart Deposition, pp. 41-42; Simpson Deposition, pp. 4-5.) They discussed the status of the Oliver Springs application and other Sonrise-related applications from time to time, based upon the small amount of information Ms. Stuart could obtain. (Stuart Deposition, pp. 37-38; Simpson Deposition, pp. 33-34.)

12. Ms. Stuart took her responsibilities in connection with the Oliver Springs application seriously, although she had been told by both Mr. Root and by representatives of Sonrise that she was not expected to do anything unless and until a hearing was necessary. (Stuart Deposition, pp. 26-28.) Nevertheless, she obtained a post office box address for the partnership in Oliver Springs and identified a problem with the tower site which she corrected. (*Id.*, pp. 28-33.) Ms. Stuart was aware that if anything changed in connection with the application, the application would have to be amended, so she forwarded the requisite information regarding th ite to Mr. Root for filing an amendment to the application. (*Id.*, pp. 29-33.)

13. Although she regularly sought information from Mr. Root on the status of the application, she did not receive it. (Stuart Deposition, pp. 33-34.) She instructed him to file the amendment regarding the tower site but only subsequently learned that he had never done so. (*Id.*, pp. 30-31.) The only correspondence she received from Mr. Root was a copy of a letter received from a competing applicant, offering to pay $6,000 if the partnership she represented would dismiss their application. (*Id.*, pp. 34-35.) She refused the offer and instructed Mr. Root to go forward with the hearing. (*Id.*) She recalls being advised at some point by Mr. Root that the application had been designated for hearing but never received a copy of the Notice of Appearance or of any other documents filed in the proceeding.[2] (*Id.*, pp. 34-37.)

14. Ms. Stuart did not learn that their Oliver Springs application had been dismissed until sometime in September of 1988. (Stuart Deposition, p. 39.) She was so advised by a Sonrise representative in a routine telephone inquiry by her on the status of the application after being unable to reach Mr. Root. (*Id.*, pp. 39-40.) She had never authorized such a dismissal and was not provided a copy either of the motion or of the Judge's Order. (*Id.*, pp. 37, 39.) When she learned that the application had been dismissed, she attempted again to reach Mr. Root by telephone but, being unsuccessful, she talked with his paralegal to find out why the application had been dismissed. (*Id.*, pp. 39-40.) She was told that there were too many problems with the application and that they "just decided to go ahead and pull it." (*Id.*, 40.)

15. At this point, Ms. Stuart asked Mr. Root's representative whether, in other words, the application was dismissed with prejudice and was told that it was not. (Stuart Deposition, p. 40.) She pursued the matter further, inquiring whether the "situation" was entirely finished, even "[i]s there going to be something later on that comes back to haunt me from this?" (*Id.*, p. 41.) She was told that the application was over and finished. [3] (*Id.*, p. 41.) Ms. Stuart repeatedly tried to talk with Mr. Root about the matter but was unsuccessful. (*Id.*, pp. 50-51.)

16. Ms. Stuart was never advised that a motion to enlarge issues had been filed against their application and was never asked to gather any information for a response. (Stuart Deposition, p. 53.) She did not learn that this application had been "dismissed with prejudice" until the Hawthorne application was designated for hearing. (*Id.*, pp. 53-54.)

17. Mr. Simpson heard, at some point, from another investor that their investments in the Rockledge, Florida; Solona, Florida; and Oliver Springs, Tennessee, applications had been "lost." (Simpson Deposition, pp. 11-12.) He talked with a Sonrise representative to find out why and was told only that there had been "engineering errors" in the Solona and Oliver Springs applications, and that the general partner had withdrawn in the Rockledge application. (*Id.*, p. 12.) He also telephoned Mr. Root to confirm this information and was told the same thing as to the reason these applications had been "lost." (*Id.*, p. 14.) Neither Sonrise nor Mr. Root ever informed Mr. Simpson that any issues had been added against the applicants with which Mr. Simpson was involved. (*Id.*, pp. 12-14.) With respect to the other applications with which Mr. Simpson was involved, he can only specifically recall discussing the Florence, Alabama, application with Mr. Root and was assured only that the application contained no engineering errors. (*Id.*, pp. 15-16.)

THE HAWTHORNE, NEVADA, APPLICATION

18. As noted above, Ms. Stuart and Mr. Simpson had remained in contact and shared a common interest in broadcast station ownership. After learning that the Oliver Springs application had been dismissed,[4] they discussed alternative methods of obtaining an ownership interest in

a broadcast facility. (Stuart Deposition, pp. 41-43.) With the assistance of a third partner, Allen Branch, a friend of Ms. Stuart's (*Id.*, pp. 4-5), Ms. Stuart and Mr. Simpson selected an available allocation for a Class A FM station in Hawthorne, Nevada, which was available on a first-come, first-served basis. (*Id.*, pp. 41-42.) They did not want the "hassle" of a comparative hearing. (*Id.*, p. 42.) In the meantime, Mr. Simpson had discussed their plans with his friend, Ray Reedy, who decided to join them in pursuing the construction permit. (Simpson Deposition, pp. 6-7; Stuart Deposition, p. 6.)

Preparing the Hawthorne Application

19. Ms. Stuart participated in preparing the FCC Form 301 application itself. (Stuart Deposition, p. 44.) She and Mr. Branch met with their consulting engineer, Larry Fuss, in October of 1988 to prepare the application for Hawthorne. (*Id.*, pp. 44-45.) Mr. Fuss discussed the questions on the form with them and took notes on their answers, after which he typed it up, and Ms. Stuart picked it up for review and signing. (*Id.*, pp. 47-48.) None of the other three partners of Hawthorne reviewed the prepared application prior to filing, but they did receive copies afterwards. (*Id.*, p. 62; Simpson Deposition, p. 27.)

20. In preparing the application, Ms. Stuart specifically discussed the answers to Question 5 on FCC Form 301 with Mr. Fuss. (Stuart Deposition, 48.) Question 5(a) asks whether any party to the applicant has or had any interest in a broadcast application pending before the Commission. Ms. Stuart answered that question in the negative, because she knew that the only application with which she had been involved had been dismissed. (*Id.*, p. 48.) She had asked both Mr. Reedy and Mr. Branch whether they had any pending applications, and they had told her that they did not. (*Id.*, p. 49.)

21. Ms. Stuart advised Mr. Fuss that the answer to Question 5(c), whether any party to the application has had an interest in an application which had been dismissed with prejudice by the Commission, would be "no," based upon her discussion with Mr. Root's paralegal, in which she had been specifically told that the Oliver Springs application had not been dismissed with prejudice. (Stuart Deposition, p. 50.) At this time, Ms. Stuart's understanding of the term "dismissed with prejudice" was that it meant "there was something against the application that was not settled when it was pulled." (*Id.*, pp. 65-66, 68-69.) Similarly, she answered Question 5(e), regarding whether any such applications had unresolved character issues against any party to this application, in the negative based upon her conversation with Mr. Root's paralegal regarding the disposition of the Oliver Springs application. (*Id.*, p. 52.)[5] Ms. Stuart understood that a "character issue" involved the qualifications of an applicant. (*Id.*, p. 67.)

22. She had also discussed with Mr. Simpson his other interests in broadcast applications. (Stuart Deposition, p. 49; Simpson Deposition, pp. 22-27.) There was some uncertainty regarding the status of Mr. Simpson's applications, but the only application which he knew for certain was still pending was one for Florence, Alabama. (Stuart Deposition, pp. 59-61, 64-65.) He had no knowledge of any of the applications being dismissed with prejudice. As far as he knew, none of them were pending with unresolved character issues, nor had any been dismissed with such issues unresolved. (Simpson Deposition, p. 32; Stuart Deposition, pp. 51-53.)

23. At that time, Mr. Simpson had no understanding of the term "dismissed with prejudice."[6] (Simpson Deposition, p. 32.) He had no understanding of how the FCC application process worked for new stations and had never heard the expression "character issue." (*Id.*, pp. 35-36.)

24. Ms. Stuart explained Mr. Simpson's interests to Mr. Fuss, that all of his interests were as a limited partner, and that his limited partnership interest in each application was less than five percent. (Stuart Deposition, p. 48.) Mr. Fuss told Ms. Stuart "that doesn't count." (*Id.*, pp. 48-49.) Consequently, she did not pursue the status of Mr. Simpson's interests any further. (*Id.*, pp. 54-55.) She did not consult with an attorney regarding this interpretation of the rules. (*Id.*, p. 55.)

25. Sometime after receiving his copy of the application, Mr. Simpson looked at the entire application more closely. (Simpson Deposition, pp. 28-29.) He called Ms. Stuart and asked her about the responses to Question 5, and she told him what Mr. Fuss had said. (*Id.*, p. 29.) As Mr. Simpson was relying upon Ms. Stuart and their consulting engineer regarding preparing the application, he merely stated his hope that they were correct. (*Id.*, pp. 22, 32.)

Updating the Hawthorne Application

26. The application at issue was filed by Hawthorne on November 22, 1988. (Exhibit A, p. 1 to the "Motion for Summary Decision" filed May 2, 1990, by Hawthorne.) This application, as noted, was designated for hearing on December 28, 1989. No amendments were filed during that period to update or correct any of the responses to Question 5. (*HDO*, paragraph 3.) Furthermore, after preparing and filing the Hawthorne application, the Hawthorne partners decided also to file an application for a construction permit for Channel 248C in Richfield, Utah, and did so under the name of Richfield FM Partnership on March 6, 1989. (Stuart Deposition, pp. 57-58.)

27. Ms. Stuart was the partner responsible for compliance with the Commission's rules. (Stuart Deposition, p. 64.) Although she and Mr. Simpson discussed some of the applications with which he was involved from time to time after the Hawthorne application was filed, the only application which they had reason to believe was pending was one for Florence, Alabama. (Simpson Deposition, pp. 22-27; Stuart Deposition, p. 63.) Neither Mr. Simpson nor Ms. Stuart recall specifically discussing any applications for Raleigh, North Carolina, or for Marion, Kentucky. (Simpson Deposition, pp. 32-34; Stuart Deposition, p. 63.)

28. When the Richfield application was filed, Ms. Stuart discussed with Mr. Fuss whether anything needed to be filed to update the Hawthorne application. (Stuart Deposition, p. 58.) Mr. Fuss advised her that it did not, and she accepted his word. (*Id.*)

29. Ms. Stuart's understanding of the Commission's rules and of "what counted" remained the same until after the *Hearing Designation Order* was released in this proceeding. (Stuart Deposition, pp. 55, 67-68.) She learned sometime in November of 1989 that the application was due to be designated for hearing as the result of a routine status check with the FM Branch on the application. (*Id.*) At that time, however, she was only able to learn that the application was being designated for hearing because of the previous connection between Mr. Simpson and herself with Sonrise, *i.e.*, Issues 1 and 2. (*Id.*, pp. 67-68.) Neither Ms. Stuart nor Mr. Simpson gained

any understanding of the relevant facts regarding these applications and of Commission rules in connection with them until after the *Hearing Designation Order* was released and present communications counsel was consulted. (*Id.*, p. 68; Simpson Deposition, p. 35.)

30. During this period, Mr. Simpson was only aware that two other applications with which he had been involved had been "lost." (Simpson Deposition, pp. 33-34.) The application for Raleigh, North Carolina, he heard from Mr. Root, had been dismissed. (*Id.*, p. 33.) Although Mr. Simpson also understood that Mr. Root had met with the partners of the applicant and told them that he would have the application reinstated, Mr. Simpson does not recall whether this was done. (*Id.*, p. 37.) He heard that the Marion, Kentucky, application was "lost" because the $6,000 hearing fee had not been paid. Id., p. 34.)

31. Mr. Simpson never learned what actually had happened regarding all of his interests in Sonrise-related applications, *i.e.*, that character issues had been designated against these applicants, until January of this year. (Simpson Deposition, pp. 19, 39.) After reviewing copies of the Commission's records, he telephoned Mr. Root to find out why he had "all of these character issues and this stuff against me." (*Id.*) Mr. Root responded, "You don't. You are a limited, passive partner. It doesn't affect you." (*Id.*)

ULTIMATE FINDINGS AND CONCLUSIONS

32. It is apparent from the findings of fact that Hawthorne and its principals failed to accurately supply the information required in FCC Form 301 and failed to comply with the requirements of Section 1.65 of the Commission's rules. Indeed, the applicant concedes that its negative answer to Question 5(a) of the Legal Qualifications section of FCC Form 301 was incorrect because a party to the application, namely Simpson, did have one or more other broadcast applications pending before the Commission. Moreover, Hawthorne's negative answer to Question 5(b) of the Legal Qualifications section of FCC Form 301 was incorrect because parties to the application, specifically Simpson and Stuart, had one or more other broadcast applications which had been dismissed with prejudice by the Commission. Finally, Hawthorne's negative answer to Question 5(e) of the Legal Qualifications section of FCC Form 301 was incorrect because a party to the application, Simpson, had an interest in one or more other broadcast applications which had been dismissed with unresolved character issues designated against them by the Commission. Also, Hawthorne has acknowledged that it failed to update changes in its application as required by Section 1.65 of the Commission's rules.

33. While the above matters are admitted by the applicant, it is argued that the derelictions were the product of faulty advice. Specifically, it appears that as a result of erroneous advice Stuart received from her consultant and a paralegal in the office of counsel, the FCC Form 301 was not completed in an accurate manner, and the information called for was not provided. Moreover, Stuart and Simpson were not provided with up-to-date information regarding the status of applications in which they had interests. Moreover, they were not informed that issues had been specified against applications in which Simpson had a limited partnership interest. Consequently, erroneous information appeared in the Hawthorne application. It does not appear that the principals of Hawthorne intended to mislead or deceive the Commission. Rather, it appears that they simply lacked the necessary knowledge to accurately complete the application form. While the Hawthorne principals were negligent and remiss in not obtaining proper legal advice and exercising greater care, it cannot be found that the errors in the Hawthorne application were anything other than a product of ignorance and carelessness without an intent or motive to mislead. *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983).

34. It is noted that the Hawthorne application was filed on a first-come, first-served basis; there were no competing applicants against which the Hawthorne principals might seek to gain a comparative advantage. Having regard for the state of mind of the Hawthorne principals, there was no motive for them to conceal or misrepresent facts regarding Simpson's other broadcast limited partnership interests. Moreover, there was no motive to conceal the dismissal of the Oliver Springs application in which Stuart and Simpson held interests, because no issues had been added in that proceeding. Finally, Simpson had no knowledge of the specification of issues against other applicants in which he was a limited partner, was not involved in any of the activities which gave rise to those issues, and believed (based on information given to him) that his minuscule limited partnership interests were of no concern to the Commission. Under these circumstances, there was no motive for Simpson to conceal these matters or their other Sonrise applications because the Hawthorne application was not a Sonrise-generated application.

35. Section 1.251 of the Commission's rules provides that a motion for summary decision may be granted where there is no genuine issue of material fact for determination at the hearing. *See, New Broadcasting Corporation*, 44 FCC 2d 386 (Rev. Bd. 1973). In order to sustain such a motion, the burden is on the moving party to demonstrate that no genuine issue as to any material fact remains, and that it is otherwise entitled to summary decision. *Telecorpus, Inc.*, 30 RR 2d 1641 (1974). It must be established that "the truth is clear," that "the basic facts are undisputed," and that "the parties are not in disagreement regarding material factual inferences that may be properly drawn from such facts." *Big Country Radio, Inc.*, 50 FCC 2d 967 (Rev. Bd. 1975). The parties hereto are in agreement there is here no genuine issue of material fact remaining for determination at the hearing. While Hawthorne should have reported the other broadcast interests of its principals when it filed its application and should have updated its application as changes occurred, the findings do not indicate an intent to deceive on the part of Hawthorne. While guilty of negligence, its actions do not warrant disqualification. *See, Gross Broadcasting Co.*, 41 FCC 2d 729, 730-731 (1973). Therefore, the remaining issues will be resolved in Hawthorne's favor.

Accordingly, IT IS ORDERED that the unopposed "Motion for Summary Decision" filed by Hawthorne FM Limited Partnership on May 2, 1990, IS GRANTED, and Issues 3 and 4 are resolved in favor of Hawthorne;

IT IS FURTHER ORDERED that the application of Hawthorne FM Limited Partnership (File No. BPH-881122MO) for a construction permit for a new FM station on Channel 228A in Hawthorne, Nevada, IS GRANTED.[7]

FEDERAL COMMUNICATIONS COMMISSION

Joseph Stirmer
Chief Administrative Law Judge

FOOTNOTES

[1] Ms. Stuart's experience has never included a broadcast position in which she worked regularly with FCC counsel nor has she any formal or informal legal training. (Stuart Deposition, pp. 69-70.)

[2] Although Ms. Stuart received copies of Mr. Root's bills, she was not expected to pay these, as Sonrise was holding the funds for doing so. (Stuart Deposition, pp. 34-35.) Similarly, she was not contacted about nor did she forward the funds for the hearing fee. (*Id.*)

[3] Although a motion to enlarge issues against this application was pending at the time of the dismissal, the motion itself was dismissed as moot when the Oliver Springs FM Partnership application was dismissed. (*Memorandum Opinion and Order*, FCC 88M-2486, released August 1, 1988.)

[4] Ms. Stuart had agreed with Sonrise that she would not obtain any other broadcast interest during the pendency of the Oliver Springs application. (Stuart Deposition, pp. 40-41.)

[5] Ms. Stuart had been unsuccessful in her attempts to confirm the information obtained from Mr. Root's paralegal with Mr. Root himself. (Stuart Deposition, pp. 50-51.) She was personally unfamiliar with the Commission and would not know how to attempt to obtain copies of relevant documents from the Commission. (*Id.*, p. 65.)

[6] At this time, Mr. Simpson understood this term to mean "they are upset about something about the application." (Simpson Deposition, p. 15.) Mr. Simpson has no legal training of any type. (*Id.*, p. 36.)

[7] In the event that exceptions are not filed within 30 days after the release of this Summary Decision, and the Commission does not review the case on its own motion, this Summary Decision shall become effective 50 days after its public release, pursuant to 48 C.F.R. 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

PACIFIC TELECOM CELLULAR OF ALASKA, INC. — File No. 05855-CL-L-90 KNKN204

For a license to cover construction permit to operate on Frequency Block B in the Domestic Public Cellular Radio Telecommunications Service to serve the Alaska 1 - Wade Hampton RSA

MEMORANDUM OPINION AND ORDER

Adopted: August 10, 1990; Released: August 16, 1990

By the Chief, Mobile Services Division:

1. Pacific Telecom Cellular of Alaska, Inc. (Pacific) has filed an application for a radio station license to cover its construction permit to operate in the Domestic Public Cellular Radio Telecommunications Service on frequency Block B (wireline) to serve the Alaska 1 - Wade Hampton RSA. Hermes Cellular Phone Group (Hermes) has filed a petition to defer the issuance of the covering license. Pacific has filed an opposition to the petition. For the reasons set forth below, we will deny the petition and grant the application.

I. BACKGROUND AND CONTENTIONS

2. Hermes requests that the Commission delay granting operating authority to Pacific for no more that six months. Hermes maintains that Pacific's headstart in the Wade Hampton RSA market will have a demonstrable impact on competition for cellular service and would harm the public interest by precluding a competing cellular carrier from entering the marketplace as a facilities-based carrier. Hermes argues that as a subsidiary of Pacific Telecom, Inc., Pacific has instant customer recognition, and will have a considerable opportunity to build up a subscriber base over which to recover fixed operating costs. Hermes also contends that with Pacific's headstart, Hermes will have no opportunity to offset a pricing advantage with improved services or innovative technology. Moreover, Hermes states that the Wade Hampton RSA is a market with extremely limited demand for cellular telephone service making headstart time more critical.

3. Hermes argues that the primary factor in Pacific's construction permit being issued eleven months before Hermes is the delay suffered by it due to several administrative problems. On November 1, 1988, the Commission dismissed Hermes application because the microfiche copy of its FCC Form 401 application did not contain a copy of the signature of its general partner. Hermes states that although it was successful in appealing that decision, its application was not reinstated until June 28, 1989. On September 14, 1989, the Commission sent a letter to Hermes requesting certain information concerning its Cellular Cross Market Partnership Agreement. Hermes responded to the Commission's letter on September 29, 1989. The Commission finally granted Hermes a construction permit on January 19, 1990, more than eleven months after Pacific received its grant. Hermes argues that because of these delays in receiving its construction permit it may not be able to complete construction by the time the harsh Alaska winter sets in, which will delay its provision of service until at least April of 1991.

4. In its opposition, Pacific contends that Hermes has failed to meet the heavy burden of proof needed to establish grounds for the Commission to defer its operating authority. According to Pacific, Hermes has not submitted market-specific evidence to support the claim that it will be foreclosed from the market. Similarly, Pacific rejects Hermes' complaint that it may be unable to complete construction of its system in order to compete effectively with Pacific. Pacific maintains that, contrary to suggestions by Hermes, there is no indication that Hermes has started construction or ordered the equipment necessary for construction activity. Pacific argues that Hermes has not obtained necessary state approvals and has only hired a manager since receipt of its construction permit. Pacific concludes that Hermes has not made a good faith effort to provide cellular service in the market expeditiously and that the Commission should not deprive the public of Pacific's service now.

II. DISCUSSION

5. The Commission has stated repeatedly that a party requesting deferral of wireline operating authority "[b]ears a heavy burden of demonstrating that such action would be in the public interest."[1] *Cellular Report and Order*; *see also*, *Eau Claire Cellular Telephone Company*, 3 FCC Rcd 3081 (Com. Car. Bur., 1988); *Illinois SMSA Limited Partnership*, 3 FCC Rcd 6144 (Com. Car. Bur., 1988). The Commission has stated that it would defer action on a wireline application only "[w]here it can be demonstrated in a particular case that harm to the public will result from allowing the wireline carrier an early entry into the market involved." *Cellular Report and Order, on reconsideration*, 89 FCC 2d 75 at n.32. In this case, the public interest will be served by expeditious provision of cellular service to the public. The Commission does not guarantee the economic well-being of any applicant or licensee, but rather desires to further the public interest by promoting the provision of reliable, economic service as soon as possible. *Cellular Report and Order*, 86 FCC 2d at 491, and *on reconsideration*, 89 FCC 2d at 74-75.

6. Hermes has failed to show that the public interest would not be served by Pacific's early entry. In addition, Hermes has not sufficiently demonstrated that immediate service to the public is harmful or that competition will be foreclosed. We are not persuaded by Hermes' conclusion that nonwireline competition would be virtually precluded by permitting Pacific to have a headstart. Early entry by wireline carriers in other markets have not prevented nonwireline permitees from successfully constructing and operating cellular systems in those markets.[2] Hermes has not provided evidence that customers choosing to receive service from Pacific will stay with that carrier even after entry of a second carrier. *See, e.g.*,

Miami CGSA, Inc., Mimeo No. 4507 at n.25 (Com. Car. Bur. May 31, 1984). *See also Century Cellunet of Jackson MSA Limited Partnership*, 4 FCC Rcd 3414 (Mob. Ser. Div. 1988).

7. Based on a review of its petition to defer, we find that Hermes has failed to satisfy its heavy burden of demonstrating that early wireline entry will so jeopardize the development of a competitive market in the Wade Hampton RSA as to be contrary to the public interest. Hermes has not presented any statistical or other evidence of anticompetitive effects or that Pacific's entry now will be detrimental to the public.

8. Accordingly, IT IS ORDERED, that the application of Pacific Telecom Cellular of Alaska, Inc. for a covering license, File No. 05855-CL-L-90, IS GRANTED.

9. IT IS FURTHER ORDERED, that the Petition for Deferral of Operating Authority filed by Hermes Cellular Phone Group IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] *Cellular Communications Systems*, 86 FCC 2d 469, 490 (1981) (*Cellular Report and Order*), *on reconsideration*, 89 FCC 2d 58 (1982), *on further reconsideration*, 90 FCC 2d 571 (1982).

[2] Moreover, Hermes can establish a cellular presence in the market by reselling the wireline carrier's cellular service.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI
TELECOMMUNICATIONS
CORPORATION
Complainant,

v. File No. E-88-34

CONTINENTAL
TELECOM, INC.,
CONTINENTAL
TELEPHONE COMPANIES
Defendants.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Deputy Chief, Enforcement Division
Common Carrier Bureau

ORDER

Adopted: August 9, 1990; Released: August 16, 1990

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On November 25, 1987, MCI Telecommunications Corporation ("MCI"), filed the above captioned formal complaint against Continental Telecom, Inc. and the Continental Telephone Companies (collectively "Contel") alleging violations of § 201(b) of the Communications Act, 47 U.S.C. § 201(b). In the complaint, MCI alleged that Contel charged unreasonable prices for providing carrier identification and billing name and address services to MCI and other interexchange carriers with which Contel interconnects. Contel denied the allegations raised in the complaint. By joint motion filed July 31, 1990, the parties advised the Commission that they had reached a mutually satisfactory settlement and requested that the complaint be dismissed with prejudice.

2. We are satisfied that dismissal of these complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the joint motion for dismissal of the above-captioned complaints IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE and the proceedings ARE TERMINATED.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-351

In re Applications of

NORTHPORT BROADCASTING, INC. (hereafter "NBI")	File No. BPH-880913MC
DAVID M. BAUGHN (hereafter "Baughn")	File No. BPH-880914MT
NORTHPORT COMMUNICATIONS, LTD. (hereafter "NCL")	File No. BPH-880915ME
WARRIOR BROADCASTING, INC. (hereafter "Warrior")	File No. BPH-880915MO
PORT BROADCASTING CORPORATION (hereafter "PBC")	File No. BPH-880915MX
SOUTHERN ENTERTAINMENT, LTD. (hereafter "Southern")	File No. BPH-880915NB
NORTHPORT BETTER BROADCASTERS, LTD. (hereafter "NBB")	File No. BPH-880915NO

For Construction Permit
for a New FM Station on
Channel 264A (100.7 MHz)
in Northport, Alabama.

HEARING DESIGNATION ORDER

Adopted: July 24, 1990; Released: August 16, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *PBC.* In response to Section III, FCC Form 301 (October 1986), PBC certified that it did not have sufficient net liquid assets on hand nor did it have sufficient funds available from committed sources to construct and operate the requested facilities for three months without revenue. PBC stated that bank financing is presently being negotiated. PBC further represented that its application will be amended certifying its financial qualifications upon completion of the negotiations. To date, no such amendment has been filed. Accordingly, PBC will be required to demonstrate its financial qualifications at hearing pursuant to an appropriate financial issue, which will be specified below.

3. *NBB.* In its application, NBB requested a waiver of 47 C.F.R. § 73.207 because its proposed site is short-spaced to WHMA(FM), Anniston, Alabama, on Channel 263C. In addition, on March 23, 1990, NBB amended its application requesting dismissal of its waiver request since its proposed site is no longer short-spaced to WHMA(FM) under the Commission's new rulings. *See Second Report and Order* in MM Docket No. 88-375, released August 18, 1989, effective October 2, 1989. Since the Commission did not dispose of NBB's application prior to October 2, 1989 and because NBB had requested a waiver of 47 C.F.R. § 73.207, NBB is now fully spaced to WHMA(FM) pursuant to MM Docket No. 88-375. Accordingly, NBB's request for waiver of 47 C.F.R. § 73.207 will be dismissed as moot.

4. The applicants below have petitioned for leave to amend their application on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
NBI	October 10, 1989; February 28, 1990
Baughn	September 11, 1989; November 8, 1989
Southern	February 14, 1989
PBC	April 4, 1989

5. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicant have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by NBI and NCL would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to PBC, whether the applicant is financially qualified.

2. To determine whether there is a reasonable possibility that the tower heights and locations proposed by NBI and NCL would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That NBB'S request for waiver of 47 C.F.R § 73.207 IS HEREBY DISMISSED AS MOOT.

9. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by NBI, Baughan, Southern, and PBC ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

10. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

11. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20054. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20054.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

VITELCOM CELLULAR, INC. — File Nos. 10553-CL-P-730-B-89 and 10554-CL-P-731-B-89

For construction authority to establish a new cellular system to operate on frequency Block B in the Domestic Public Cellular Radio Telecommunications Service to serve Market Nos. 730 and 731, U.S. Virgin Islands 1 - St. Thomas and St. John and U.S. Virgin Islands 2 - St. Croix Rural Service Area

MEMORANDUM OPINION AND ORDER

Adopted: August 13, 1990; Released: August 17, 1990

By the Chief, Mobile Services Division:

I. BACKGROUND

1. Vitelcom Cellular, Inc. ("Vitelcom") was the sole wireline applicant for the cellular authorizations in the Virgin Islands 1 and Virgin Islands 2 Rural Service Areas and was announced as the tentative selectee for these markets.[1] On November 29, 1989, Ackley Communications Enterprises, Inc. ("Ackley") filed a Petition to Deny against the above-captioned applications.

II. TRANSFER ISSUES

A. Contentions of the Parties

2. Ackley asserts that the ownership of Vitelcom was unlawfully transferred during the pendancy of Vitelcom's application. According to Ackley, at the time Vitelcom filed the captioned cellular applications, Vitelcom was wholly owned by Atlantic Tele-Network Co. ("Atlantic"). Atlantic was controlled fifty-five percent by Atlantic Tele-Network Management Co. ("Atlantic Management") and forty-five percent by Shearson, Lehman, Hutton, Inc. ("Shearson"). The ownership of Atlantic Management was comprised of Mr. Cornelius B. Prior, Jr. and Mr. Jeffrey J. Prosser, each controlling 47.5 percent of the shares. Mr. Craig F. Swoboda owned the remaining 5 percent of Atlantic Management.

3. The first illegal transaction that took place, asserts Ackley, was Atlantic Management's acquisition of Shearson's interest in Atlantic by the terms of an undisclosed option agreement. As a result of the exercise of the option, Atlantic Management owned 100 percent of Atlantic which, in turn, owned 100 percent of Vitelcom. Subsequent to this alleged transfer of control, Ackley states other improper transfers of control were made. First, Messrs. Prior and Prosser acquired Mr. Swoboda's five percent interest in Atlantic Management so that each gained negative control with a 50 percent interest each in Management. Second, Ackley states, Atlantic Management merged with a newly created corporation, Atlantic Tele-Network, Inc. ("Atlantic Network")[2], which plans to offer 25 to 35 percent of its shares to the public. [3] Ackley claims that these changes constitute major changes in control of Vitelcom in violation of Section 22.922 of the Commission's Rules.[4]

4. In its Opposition, Vitelcom states that it did not violate Section 22.922 of the Commission's Rules. Vitelcom stresses that at the time the Vitelcom application was filed, Atlantic had full control of Vitelcom and that that ownership has never changed. Vitelcom additionally argues that the transfer of Shearson's interest to Atlantic Management was not improper. At the time Atlantic Management obtained an option to acquire Shearson's interest, Vitelcom had not yet been formed. Although the option was exercised two months after the cellular applications had been filed, Atlantic was still controlled by Atlantic Management. Vitelcom denies Ackley's charge that it attempted to conceal the existence and later exercise of the option to acquire Shearson's interest.

5. Vitelcom also stresses that the changes in control of Atlantic Management were found to be in the public interest by the Commission on October 11, 1989, when the Commission granted Virgin Island Telephone's transfer of control applications. Additionally, Vitelcom argues, it has requested waivers of Section 22.922 of the Commission's Rules, if the Commission finds such waivers necessary, and it argues that the Commission has granted waiver requests involving interest more directly related to control of the cellular applications than in the instant situation.

B. Discussion

6. We have reviewed the pleadings in this case and have determined that the Petition to Deny filed by Ackley lacks merit on this issue. There was no unauthorized transfer of control. The transfers of control of the parent company were approved by the Commission. By amendment filed with the Commission on August 21, 1989, Vitelcom informed the Commission of the then pending applications for transfer of control of Atlantic Management and requested waivers of Section 22.922 of the Commission's Rules should the Commission deem such waivers necessary. On December 29, 1989, pursuant to Section 22.23(g)(3) of the Commission's Rules, Vitelcom requested a waiver of the "cut-off" rules. *See* Section 22.31 of the Commission's Rules.

7. The Commission's main interest in adopting Section 22.922 of the Rules is the prevention of speculation by applicants who have no interest in actually constructing and operating a cellular station. *See Third Report and Order*, 4 FCC Rcd 2440 (1988); *See also, Amendment of Section 22. 922 of the Commission's Rules to Permit Limited Transfers and Assignments of Applications in Rural Service Areas (NPRM)*, 5 FCC Rcd 3265 (1990). None of the circumstances involved with the instant transfers evidences that the application was filed with intent to speculate in RSA applications. Specifically, the option agreement for Atlantic Management to acquire Shearson's interest was entered into prior to the filing of the cellular

applications. Additionally, although Mr. Swoboda's interest was transferred after the filing of the application, which constituted a technical violation of Section 22.922, we have examined the waiver requests which were filed, and we find that a waiver is warranted because the purchase of Mr. Swoboda's interest in Atlantic Management, and consequently, Vitelcom is incidental to a larger corporate business transaction involving the wireline facilities of Virgin Island Telephone. Accordingly, the requests for waivers of Section 22.922 of the Commission's Rules filed by Vitelcom will herein be granted. *See generally, Modoc RSA Limited Partnership*, 4 FCC Rcd 3996 (1989).

8. Additionally, we will grant Vitelcom's request for an exemption of the "cut-off" rules in Section 22.31 of the Commission's Rules. Section 22.23(g)(3) of the Commission's Rules provides that "[a]n application will be considered to be a newly filed application if it is amended by a major amendment, . . . except when . . . [t]he amendment reflects only a change in ownership or control found by the Commission to be in the public interest, and for which a requested exemption from the 'cut-off' requirements . . . is granted." The amendment filed by Vitelcom informing the Commission that Messrs. Prior and Prosser had gained negative control of Atlantic Management, although a major amendment, reflects a change of control found by the Commission to be in the public interest. Because the transfer of negative control involved the larger transaction including the Virgin Island Telephone Co., the exemption of the cut-off rule is granted.

III. INTERCONNECTION

A. Contentions of the Parties

9. Ackley provides mobile communications services to the U.S. Virgin Islands through Public Mobile Service (PMS) paging facilities and interconnected Specialized Mobile Radio (SMR) facilities. Virgin Island Telephone is the sole landline carrier on the islands. Hence, Ackley claims, it is dependent on Virgin Island Telephone for interconnection to the public switched network. However, Ackley asserts, Virgin Island Telephone has for a long time refused to provide Ackley with reasonable interconnection and discriminates in favor of its affiliated company, Vitelcom, in providing interconnection in violation of Sections 201(a) and 202(a) of the Communications Act of 1934, as amended. For example, Ackley asserts that Virgin Island Telephone delayed the installation of trunk lines and failed to install business lines as Ackley requested. Additionally, Ackley states that Virgin Island Telephone delayed the assignment of NXX local exchange numbers to be used by Ackley customers and assigned numbers which had recently been used by other customers, while the numbers assigned to Vitelcom customers were new numbers. On the other hand, Ackley states, Virgin Island Telephone provided its affiliate, Vitelcom, with all of the interconnection facilities and services necessary for Vitelcom to begin service under a Special Temporary Authority ("STA") granted to it to allow service to the islands in the wake of Hurricane Hugo.

10. Vitelcom denies that Virgin Island Telephone failed to offer reasonable interconnection to the public switched network to Ackley. Vitelcom argues that Ackley's complaints are all directed to the quality of the local service it receives from Virgin Island Telephone and that quality of service is a matter solely within the jurisdiction of the local public service commission and not this Commission. Additionally, Vitelcom points out that the examples Ackley cites of Virgin Island Telephone's alleged failures to deal reasonably with Ackley involve circumstances that arose after the devastation of Hurricane Hugo. Vitelcom states that Ackley is not the only Virgin Island Telephone customer who has experienced service interruptions because of Hurricane Hugo.[5] Vitelcom states that Virgin Island Telephone is working diligently to fully restore service to the islands.

11. Vitelcom further states that it investigated Ackley's complaints with Virgin Island Telephone personnel and found discrepancies in Ackley's allegations and indicates that the allegations are false. Vitelcom admits that Virgin Island Telephone assigned the previously unused NXX code of 771-XXXX to it, but states that Ackley had refused this code on the grounds that Ackley wanted codes which only required five-digit dialing. Vi elcom also argues that Virgin Island Telephone had not taken an extraordinary amount of time to assign the numbers to Ackley in light of the disarray into which the hurricane had thrown all service. Vitelcom answers Ackley's argument that a customer of Ackley's was assigned a number previously used by the largest hotel on the islands by pointing out that the hotel had stopped using that number in 1985, five years before it was reassigned.

B. Discussion

12. Sections 201 and 202 of the Communications Act require a carrier to provide reasonable interconnection to cellular and PMS licensees. In *The Need to Promote Competition and Efficient Use of Spectrum for RCC (Cellular Interconnection Proceeding)*, 4 FCC Rcd 2369 (1989). In this case we find that petitioner has not established a prima facie case of violations of Commission policies or the Communications Act. Vitelcom has sufficiently answered the charges in the affidavit to show that the reason for any delays in granting Ackley's requests for new service stem from Virgin Island Telephone's efforts to restore previously existing service after the damage caused by Hurricane Hugo. Ackley does not refute that the outside plant of Virgin Island Telephone was nearly completely destroyed and many cables have been so badly damaged they must be removed and replaced. The interruptions in service to Virgin Island Telephone customers were not limited to Ackley. Additionally, Vitelcom explained that Ackley itself is responsible for the assignment of previously used NXX codes since Ackley refused this tendered assignment. Similarly, the record shows that there was not an unreasonable delay in the assignment of the numbers after Ackley submitted its request. Therefore, we find that petitioner has failed to establish any reason why these cellular applications should be denied.

IV. CONCLUSIONS

13. For the reasons set forth herein, we find that Vitelcom Cellular, Inc. is legally, financially, technically, and otherwise qualified to hold the wireline cellular licenses for the U.S. Virgin Islands 1 and U.S. Virgin Islands 2 Rural Service Areas and the grant of the applications will serve the public interest.

V. ORDERING PARAGRAPHS

14. Accordingly, *IT IS ORDERED* that the Petition to Deny filed by Ackley Communications Enterprises, Inc. IS DENIED.

15. *IT IS FURTHER ORDERED* that the applications of Vitelcom Cellular, Inc., File Nos. 10553-CL-P-730-B-89 and 10554-CL-P-731-B-89, ARE GRANTED.

16. This authorization does not include the right to any interference protection in any areas outside the U.S. Virgin Islands 1 and U.S. Virgin Islands 2 RSAs and is also conditioned upon coordinating with current or future co-channel licensee(s) in the areas outside the RSA. The licensee herein is put on notice that in the event current or future MSA/RSA licensees encounter interference from any extensions, the licensee herein will have to change frequencies in those cells or pull back its 39 dBu contours to eliminate any interference due to an extension.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] *See* Public Notice, Mimeo No. CL-89-236 (Released August 1, 1989).

[2] The Virgin Islands Telephone Company ("Virgin Island Telephone"), which like Vitelcom, is wholly owned by Atlantic, applied for Commission approval for the transfer of control of Swoboda's 5% interest to Prior and Prosser and for approval of the pro forma transfer of control for the merger of Atlantic Management and Atlantic Network. The transfer of control applications (File Nos. 31095-CD-TC-01-89 and 31097-CD-TC-01-89) filed by Virgin Island Telephone were granted by the Commission on October 11, 1989.

[3] Atlantic Network has the same structure that its predecessor Atlantic Management had--Mr. Prior and Mr. Prosser each owning 50 percent. After the pulic offering is made, the negative control currently held by Prior and Prosser will be relinquished.

[4] Section 22.922 of the Commission's Rules states:

> (a) Notwithstanding any other section of this Part, the sale, transfer, assignment or other alienation of any cellular application to offer service to Rural Service Areas is prohibited prior to the grant of a construction authorization. This restriction on transfers of interests in such cellular applications shall include any form of alienation, including option arrangements and agreements, as well as equity and debt placement plans.

[5] Specifically, Vitelcom states that at the time it filed its Opposition, 65 percent of the access lines on St. Croix and 25 percent of the access lines on St. Thomas and St. John were still out of service.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Liability for Forfeiture of

ROSEVILLE TELEPHONE COMPANY — File No. 63500-89-29-RPS

Notice of Apparent Liability for Forfeiture for failure to file renewal notice with respect to Station KKB579 at Roseville, California

MEMORANDUM OPINION AND ORDER

Adopted: August 13, 1990; Released: August 16, 1990

By the Chief, Mobile Services Division:

1. Roseville Telephone Company ("Roseville") has filed an "Application for Remission or Reduction of Forfeiture" of the $3,780.00 forfeiture imposed by the Mobile Services Division ("MSD") in a "Notice of Apparent Liability for Forfeiture" (" *NALF* ") issued June 30, 1989.

I. BACKGROUND

2. On September 29, 1980, the MSD granted Roseville authority to operate frequencies 454.375 MHz and 454.475 MHz facilities for Station KKB579 at Roseville, California. Roseville's authorization expired on July 1, 1988. Roseville failed to timely file its renewal application for the station. On June 13, 1989, Roseville filed a request for Special Temporary Authority ("STA") to continue to operate Station KKB579, pending Commission action on Roseville's application for reinstatement of the expired authorization. On June 30, 1989, the MSD issued the *NALF*, finding that an apparent violation of Section 22.3(b) of the Commission's Rules had occurred for operation of an unauthorized station, and imposed a forfeiture of $3,780.00.

II. ROSEVILLE'S CONTENTIONS

3. Roseville argues that the forfeiture should be remitted or reduced to a nominal amount. It states that in October 1986, when it filed a notification that construction was completed on a November 1985 authorized modification, its legal counsel mistakenly informed Roseville that its notification extended Roseville's license for 10 years. Roseville adds that it had no reason to question this statement because the Commission did not issue a new license to Roseville after Roseville filed its construction notification, and it never possessed any document bearing the expiration date for its modified license. Roseville also asserts that after the Commission extended the maximum license term from five years to ten years, it did not issue a revised license to Roseville showing the new expiration date. Roseville argues that it did not know when its license expired because its legal counsel was not aware of, and did not know that Roseville's license expired on July 1, 1988.

4. Roseville argues that several factors mitigate in favor of remission or reduction of the forfeiture: (1) its violation was unintentional and not the result of negligence but, rather, due, in part to Commission failure to issue a license showing the expiration date; (2) it demonstrated good faith in voluntarily disclosing its unintentional violation and took immediate remedial action; and (3) it has no prior history of rule violations.

III. DISCUSSION

5. After reviewing the facts and Roseville's contentions, we find no basis upon which to remit or reduce the forfeiture. The fact that Roseville's violation might have been unintentional does not alter the fact that unauthorized operation existed and that the violation continued over a period of time. We have previously noted that

> "[t]he fact that the applicant's violation occurred through inadvertence does not prevent it from being willful. It is not necessary that the violation be intentional. All that is necessary is that the licensee knew he was doing the act in question . . . ."

Mobile Radio Telephone & Paging Service, Inc., Mimeo No. 2397 (Com. Car. Bur., released Feb. 16, 1983). *See also* Section 312(f) of the Communications Act, as amended, which defines "willful". Moreover, the fact that a licensee voluntarily notifies the Commission of a potential rule violation, takes remedial action, and has no prior rule violations history are factors which are taken into account in setting the amount of forfeiture. In this case, these factors were taken into account in setting the proposed forfeiture. *See* Section 503(b)(2)(B) of the Communications Act; *Delray Cellular Associates*, 4 FCC Rcd 2233 (1989).

6. We also find unavailing Roseville's other arguments. A licensee is responsible for complying with Commission rules[1] and is responsible for its own acts or omissions. *See Lorain Community Broadcasting Co.*, 18 FCC 2d 686 (1969) (applicant, not communications counsel, must be held responsible for compliance with the Commission's rules); *Roberts Cellular, Inc.*, 5 FCC Rcd 1357 (1990) (an applicant, not its agent or the firm preparing its application, is entirely responsible for the contents of its application). The MSD's records indicate that Roseville was issued a license for call sign KKB579 for the Roseville location on April 1, 1988, and that this license specifically stated that the license expiration date was July 1, 1988. Therefore, the Commission did in fact issue Roseville an authorization with the July 1, 1988 expiration date, and Roseville should have had knowledge of that date. Roseville's reliance on its attorney's advice does not absolve Roseville from failing to file timely its renewal notice.

7. In conclusion, Roseville has not justified a remission or reduction of the forfeiture imposed by the *NALF* and, consequently, we uphold the $3,780.00 forfeiture.

IV. ORDERING PARAGRAPHS

8. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80(f)(4) of the Commission's Rules, 47 C.F.R. §1.80(f)(4), IT IS ORDERED that Roseville Telephone Company FORFEIT to the United States the sum of Three Thousand Seven Hundred Eighty Dollars ($3,780.00) for the violation of Section 22.3(b) of the Commission's Rules. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission within thirty (30) days of release of this Order to: Federal Communications Commission, Fee Section, Finance Branch, P. O. Box 19209, Washington, DC 20036.

9. IT IS FURTHER ORDERED that if said forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act, as amended, 47 U.S.C. § 504(a).

10. IT IS FURTHER ORDERED that a copy of this Order BE SENT to Roseville Telephone Company by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTE

[1] Section 0.406 of the Commission's Rules states in pertinent part:

> Persons having business with the Commission should familiarize themselves with those portions of its rules and regulations pertinent to such business. All of the rules have been published and are readily available . . . .

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-438

In the Matter of

Amendment of Section 73.202(b),	RM-6804
Table of Allotments,	
FM Broadcast Stations.	
(Citronelle, Alabama)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 31, 1990; Released: August 17, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 4 FCC Rcd 7104 (1989), issued in response to a petition filed on behalf of Fuller Broadcasting Company of Mobile County, Inc. (petitioner), permittee of Station WKQR(FM), Channel 270A, Citronelle, Alabama, proposing the substitution of Channel 271C3 for Channel 270A, and modification of its permit to specify operation on the higher-powered channel. Petitioner filed comments in support of the proposal. No other comments were received.

2. As indicated in the *Notice*, Channel 271C3 can be allotted to Citronelle, Alabama, at the petitioner's suggested site,[1] consistent with the minimum distance separation requirements of the Commission's Rules.[2]

3. In view of the above, we believe the public interest would be served by substituting Channel 271C3 for Channel 270A at Citronelle, Alabama, since it could provide the first expanded coverage FM service to the community. Therefore, and in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying the permit of Station WKQR(FM) to specify operation on Channel 271C3 in lieu of Channel 270A, as requested.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 11, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Citronelle, Alabama	271C3

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the permit issued to Fuller Broadcasting Company of Mobile County, Inc. for Station WKQR(FM), Citronelle, Alabama, IS MODIFIED effective **October 11, 1990,** to specify operation on Channel 271C3 in lieu of Channel 270A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Coordinates at the petitioner's suggested site are 31-06-08 and 88-22-28.

[2] Because this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, the permittee may avail itself of the provisions of Section 73.213(c)(1) of the Commission's rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-457

In the Matter of

Amendment of Section 73.202(b), RM-6857
Table of Allotments,
FM Broadcast Stations.
(Carthage, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 7, 1990; Released: August 20, 1990

By the Deputy Chief, Policy and Rules Division:

1. Pursuant to the request of Carthage Broadcasters (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 7503 (1989), proposing the allotment of FM Channel 282A to Carthage, Texas, as that community's second local FM service. Petitioner filed comments in support of the *Notice* and stated its intention to apply for the channel, if allotted. No other comments were received.

2. As indicated in the *Notice*, Channel 282A can be allotted to Carthage, Texas, in compliance with the minimum distance separation requirements of the Commission Rules, without the imposition of a site restriction.[1]

3. We believe the public interest would be served by allotting Channel 282A to Carthage, Texas, since it could provide the community with its second local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 11, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Carthage, Texas	255C1, 282A

4. The window period for filing applications will open on **October 12, 1990,** and close on **November 13, 1990.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Andrew J. Rhodes, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 282A at Carthage, Texas, are 32-09-24 and 94-20-18. Because this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, applicants may avail themselves of the provisions of Section 73.213 (c)(1) of the Commission's Rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-355

In re Applications of

GROVER H. HUBBELL d/b/a HUB COMMUNICATIONS (hereafter "Hubbell")	File No. BPH-880809MZ
FRANK D. WARD (hereafter "Ward")	File No. BPH-880810MM
CANTON BROADCASTING ASSOCIATES (hereafter "CBA")	File No. BPH-880810MN
DAVID T. AND ANN D.G. BUTTON (hereafter "Button")	File No. BPH-880810MP

For Construction Permit
for a New FM Station on
Channel 268A (101.5 mHz)
in Canton, New York

HEARING DESIGNATION ORDER

Adopted: July 27, 1990; Released: August 20, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

3. Hubbell petitioned for leave to amend its application on February 7, 1989. The accompanying amendment was filed after December 15, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

4. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and applicants Hubbell, Ward and Button have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by the two applicants would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a a subsequent Order upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Hubbell, Ward and Button would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in the light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Hubbell IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

8. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall pursuant to Section 311 (a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-360

In re Applications of

Ruth Harper Dunn t/r LAUDERDALE BROADCASTING COMPANY (hereafter "Lauderdale")	File No. BPH-871007MA
CRAIG FITZHUGH (hereafter "Fitzhugh")	File No. BPH-871008MH
HAROLD L. DRUMWRIGHT d/b/a H & L PARTNERSHIP, A LIMITED PARTNERSHIP (hereafter "H&L")	File No. BPH-871008MJ

For Construction Permit
for a New FM Station on Channel 231A
(94.1 MHz) in Ripley, Tennessee

HEARING DESIGNATION ORDER

Adopted: July 27, 1990; Released: August 20, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters*. On March 19, 1990, Lauderdale filed petitions to deny the H&L and Fitzhugh applications. Moreover, on March 29, 1990, Lauderdale's attorney filed an additional petition to deny the Fitzhugh application. In the petition filed against H&L, Lauderdale asserts that the applicant has not complied with the public notice requirement of 47 C.F.R Section 73.3580. The petition filed against Fitzhugh by Lauderdale alleges that Fitzhugh did not name all of the principals to his application. The petition filed on behalf of Lauderdale, by its attorney, asserts that the Fitzhugh application should not have been accepted for filing. Specifically, Petitioner alleges that the maps contained in Exhibits 6 and 7 of the Fitzhugh application are defective. Petitioner claims that both the 7.5-minute topographic site map and the map displaying the signal contours of Mr. Fitzhugh's proposed facility do not indicate their source, and that they lack the required markings of latitude and longitude. Petitioner further contends that the 7.5 minute map fails to show the USGS coordinate markings printed on both sides of the axes as required by the *Public Notice Regarding Transmitter Site Maps*, 57 RR 2d 1549 (1985). Therefore, Petitioner contends, Mr. Fitzhugh's application is unacceptable for filing and should be returned.

3. With respect to the March 19, 1990, petitions to deny, we hold that the petitions are in all respects the equivalent of a petition to specify issues. Since the Commission's *Report and Order* in re *Revised Procedures for the Processing of Contested Broadcasting Applications; Amendments of Part 1 of the Commission's Rules*, 72 FCC 2d 202, 45 RR 2d 1220 (1979), directed the deletion of all issue pleadings in pending cases, the matters sought to be raised in these petitions have not been considered. However, an opportunity to raise any allegations contained therein will be afforded the parties post-designation pursuant to Section 1.229. Accordingly, the March 19, 1990 petitions to deny will be dismissed.

4. With respect to Lauderdale's petition filed by its attorney, a review of the *original* copy of the application submitted by Fitzhugh reveals that full, original maps were included as both exhibits No. 6 and 7. Consequently, both the 7.5 minute map and the contour map satisfy all relevant Commission requirements. In view of these findings, we have determined that the petition has no merit and, as such, will be denied.

5. The Ripley applications being considered in this proceeding conflict with a pending Rule Making to change the allocation for Ripley, Tennessee, from Channel 231A to Channel 235A. On August 8, 1989, the Commission released a *Report and Order* in MM Docket No. 87-619 to amend the FM *Table of Allotments*. This *Report and Order*, which became effective on September 22, 1989, changes the allocation for Ripley, Tennessee, from Channel 231A to Channel 235A. However, petitions for reconsideration of the Commission's action in MM Docket No. 87-619 are presently pending. At the time the Ripley applications were filed, a petition for Rule Making had not been filed. Consequently, the Ripley applications met all of the spacing criteria of 47 C.F.R. Section 73.207(a) and were accepted for filing. Accordingly, we will designate these applications for hearing. However, the construction permit issued to any of these applicants will be conditioned upon the final outcome of the Rule Making proceeding in MM Docket 87-619.

6. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That the March 19, 1990 petitions to deny filed by Lauderdale ARE DISMISSED, and the March 29, 1990 petition to deny IS DENIED.

10. IT IS FURTHER ORDERED, That, in the event a construction permit is granted to any one of the applicants in this proceeding, the construction permit shall be conditioned upon the final outcome of the Rule Making proceeding in MM Docket No. 87-619.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-359

In re Applications of

SHEILA ANN ADAMS (hereafter "Adams") — File No. BPH-880629MJ

JACKSON RADIO, LTD. (hereafter "Jackson") — File No. BPH-880630MG

For Construction Permit for a New FM Station on Channel 227A (93.3 MHz) in Marianna, Florida

HEARING DESIGNATION ORDER

Adopted: July 27, 1990; Released: August 20, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters*. At the time the Adams application was tendered, there was pending before the Commission a Notice of Proposed Rule Making in MM Docket No. 87-375 seeking to amend the FM Table of Allotments to, *inter alia*, substitute Channel 229C2 for 228A at Geneva, Alabama, and the simultaneous modification of the license for WRJM-FM, Geneva, Alabama, to operate on the substituted channel. (*Notice of Proposed Rule Making* in Docket 87-375, 2 FCC Rcd 5628 (1987)). Adams stated in her application that her proposed site would be short-spaced to WRJM-FM, if the Rule Making proposal was granted. Therefore, she requested a waiver of 47 C.F.R. Section 73.207. We note that Jackson's mutually exclusive application proposed a fully-spaced site. The *Report and Order* in Docket 87-375 was adopted on August 23, 1988, released on September 15, 1988, and became effective on October 31, 1988. *Report and Order*, 3 FCC Rcd 5544 (1988). Pursuant to the directive in the *Report and Order*, the licensee of WRJM-FM filed a minor change application with the Commission to implement the channel change. (File No. BPH-881018II)[1] Consequently, the Adams proposal, at the site specified in the original application, is now short-spaced to the WRJM-FM facility.

3. On December 6, 1988, Jackson submitted a Motion to Dismiss the Application of Sheila Ann Adams. Jackson asserts that Commission policy does not permit waiver of the minimum separation requirements where there is one or more mutually exclusive applicants who specifies a fully-spaced site. Jackson further asserts that time had passed for amendments of right and that Ms. Adams proffered no amendment eliminating the short-spaced site or addressing the merits of the waiver request. Therefore, Jackson requested dismissal of the Adams application.

4. On October 19, 1989, a letter was sent to Ms. Adams by the Chief, FM Branch, directing her to amend the pending application to specify a site which complies with Section 73.207. Thereafter, by letter dated December 19, 1989, Ms. Adams' application was returned for failure to prosecute, inasmuch as it appeared that she did not respond to the letter of October 19, 1989. However, it was discovered that Ms. Adams had filed a timely curative amendment on November 16, 1989. On December 22, 1989, Ms. Adams' attorney filed a letter noting the submission of Ms. Adams' amendment and requesting that the letter returning the application be rescinded. A Petition for Reinstatement Nunc Pro Tunc followed on January 10, 1990. By letter dated January 12, 1990, the Adams application was reinstated *nunc pro tunc*.

5. On February 12, 1990, Jackson filed a Petition for Reconsideration of the Mass Media Bureau's action reinstating, *nunc pro tunc*, Ms. Adams' application. Jackson asserts that Ms. Adams did not act with reasonable diligence to correct the short-spacing problem. Jackson contends that although the Rule Making was granted in September, 1988, Ms. Adams did nothing to eliminate the short-spacing until notified by the Commission in October, 1989.

6. On March 27, 1990, Jackson filed a Petition to Dismiss or Deny the Adams application. Jackson contends that at the very least, under 47 C.F.R. Section 1.65, Ms. Adams had the obligation to maintain the continuing accuracy and completeness of the information contained in her application. Jackson maintains that Section 1.65 not only imposes on every Commission applicant the responsibility for continuing accuracy and completeness of the information furnished in a pending application, it also provides:

> Whenever there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, submit a statement furnishing such additional or corrected information as may be appropriate.

Therefore, Jackson argues, Adams should not be allowed to excuse her lack of diligence by claiming she was not obligated to address the short-spacing until so directed by the Commission.

7. As stated in the October 19, 1989 Commission letter to Adams, when a Rule Making application that is short-spaced to an already pending application is granted, it is the Commission's policy to confer upon the applicant one opportunity to amend its application to comply with the minimum separation requirements. This opportunity was given Ms. Adams, who thereafter filed a timely amendment to her application which satisfies the requirements of Section 73.207. Moreover, Ms. Adams acted with due diligence, insomuch as she responded to our request within the period authorized by the Branch letter. Jackson's reliance upon the *Donovan Burke* case, and its attempts to analogize that case with the situation at hand, is misplaced. *Donovan Burke*, 60 RR 2d 110 (1986). The *Dono-*

van Burke case concerned an application that was short-spaced when filed with the Commission, as contrasted with the Adams application which was fully spaced upon filing, but became short spaced by subsequent, intervening events. Accordingly, in light of the above, Jackson's motion to dismiss, petition for reconsideration and petition to deny will each be denied.

8. The Marianna applications in this proceeding conflict with a pending Rule Making proceeding to modify the frequency of WGWD(FM) Gretna, Florida, from Channel 264A to Channel 227A. *Notice of Proposed Rule Making*, Docket No. 90-211, 5 FCC Rcd 2668 (1990). At the time that the Marianna applications were filed, a petition for Rule Making had not yet been filed. Consequently, the Marianna applications met all the spacing criteria of 47 C.F.R. Section 73.207(a) and were accepted for filing. Accordingly, we will designate these applications for hearing. However, the construction permit issued to either of these applicants will be conditioned upon the outcome of the WGWD(FM), Gretna, Florida Rule Making proceeding.

9. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicant have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Adams would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

10. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

11. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Adams would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

12. IT IS FURTHER ORDERED, that Jackson's Motion to Dismiss, Petition for Reconsideration and Petition to Dismiss or Deny ARE DENIED to the extent noted within.

13. IT IS FURTHER ORDERED, that, in the event that a construction permit is granted to either applicant in this proceeding, it shall be conditioned upon the outcome of the WGWD(FM), Gretna, Florida Rule Making proceeding.

14. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

15. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

16. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

17. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] Pursuant to MM Docket No. 87-618, the Commission considered, *inter alia*, amending the FM Table of Allotments to substitute Channel 229C1 for Channel 228 for the Geneva, Alabama allocation. These two Rule Makings were virtually running concurrently with one another. The *Report and Order* in 87-618 was adopted on December 7, 1989, released on January 3, 1990 and became effective on February 20, 1990. Consequently, on February 7, 1990, the licensee for WRJM-FM filed an amendment to its pending minor change application to specify Channel 229C1. (*Report and Order* in Docket 87-618, 5 FCC Rcd 37 (1990)).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-353

In re Applications of

MONTBROOK BROADCASTING, LTD. (hereafter "Montbrook")	File No. BPH-880825MF
LAURA S. GREENSTEIN (hereafter "Greenstein")	File No. BPH-880825MI
CHAMPION COMMUNICATIONS, LTD. (hereafter "Champion")	File No. BPH-880825MS
WXVI RADIO, INC. (hereafter "WXVI")	File No. BPH-880825MV
MILLBROOK SUPERIOR BROADCASTERS LTD. (hereafter "Millbrook")	File No. BPH-880825NA

For Construction Permit for a New FM Station on Channel 246A in Millbrook, Alabama

HEARING DESIGNATION ORDER

Adopted: July 27, 1990; Released: August 20, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* On December 13, 1988, Champion filed a letter requesting dismissal of its instant application, pursuant to 47 C.F.R. § 73.3568. However, it did not provide the appropriate statement of no consideration required by 47 C.F.R. § 73.3525. Accordingly, Champion's application will be designated for comparative hearing herein.

3. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and Montbrook have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Montbrook would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

4. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Montbrook would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That, pursuant to Champion's December 13, 1988 request for dismissal of its application, its application IS HEREBY DISMISSED.

8. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

9. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20054. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20054.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance

stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Ebasco Services Incorporated
New York, New York

File Nos. 751523-524

For a waiver of the Rules to allow the continued use of a non-conforming pair of 18 GHz frequencies in the OFS

WAIVER

Adopted: August 14, 1990; Released: August 20, 1990

By the Chief, Land Mobile and Microwave Division:

1. Ebasco Services Incorporated seeks to modify the licenses for two stations in the Private Operational-Fixed Microwave Service (OFS). In connection with this request, it asks that we waive Section 94.65(j)(5) of the Commission's Rules, 47 C.F.R. § 94.65(j)(5), to permit its continued use of non-paired frequencies between the two stations.

2. In support of its request, Ebasco states that waiver will permit it to use existing microwave equipment and to release two frequency pairs that are now licensed to Ebasco but that will not be necessary for its modified operation. If waiver is not granted, Ebasco states that its project will be abandoned as cost prohibitive and all existing frequencies will be retained for its use.

3. We deny the waiver request. Section 94.65(j)(5) sets forth specific paired frequency authorizations. These represent the most efficient use of spectrum possible under our rules. The use of channel pairs that do not conform to our rules, in contrast, is highly wasteful of spectrum. As all channels are assigned in pairs, using only one channel of the pair requires that the other half of the pair remain idle. We have permitted licensees such as Ebasco to continue non-conforming operations on a grandfathered basis. When such licensees choose voluntarily to change their operations, however, the equities that favored grandfathered non-compliance are lost. Therefore, we have consistently declined to waive our channel allocation rules where modification of an existing grandfathered operation is sought.

4. Ebasco has not justified a different approach. Clearly, purchasing new equipment for operation on paired frequencies is more expensive than continuing to use existing equipment on unpaired channels. Individual financial concerns, however, are not grounds for wasteful allocation of spectrum. As for Ebasco's offer of improved but still inefficient operation, our spectrum allocation policies are better served by rejection of all non-conforming proposals than by acceptance of proposals substituting one non-conforming situation for another. Were we to follow this latter course, licensees in Ebasco's position would have little incentive to comply with our rules, and our ultimate objective--spectrum allocated as efficiently as possible--would be frustrated.

5. We conclude, in light of the above, that the relief requested is not warranted. Accordingly, IT IS ORDERED, pursuant to Section 0.331 of the Commission's Rules, 47 C.F.R. § 0.331, that the waiver request filed by Ebasco Services Incorporated, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile and Microwave Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

THE WESTERN UNION TELEGRAPH CO. — **CC Docket No. 78-97 Phases I and II**

Revisions to Tariffs F.C.C. Nos. 240 and 258 filed with Transmittal No. 7346; Revision to Tariffs F.C.C. Nos. 268 and 269 filed with Transmittal Nos. 7347 and 7348; Revisions to Tariffs F.C.C. Nos. 229, 240, 254, 258, 260, 263 and 268 filed with Transmittal No. 7417

Interconnection Arrangements Between and Among the Domestic and International Record Carriers — **CC Docket No. 82-122**

In the Matter of

THE WESTERN UNION TELEGRAPH COMPANY, Complainant,

v. — File No. E-87-140

WESTERN UNION INTERNATIONAL, INC. and MCI INTERNATIONAL, INC., Defendants.

ORDER

Adopted: August 13, 1990; Released: August 20, 1990

By the Chief, Common Carrier Bureau:

1. MCI International, Inc., (MCII), its subsidiary, Western Union International, Inc. (WUI) (collectively MCII/WUI), and Western Union Corporation (formerly known as The Western Union Telegraph Company) (Western Union) have filed a "Joint Motion for Order Terminating Proceedings" in the above-captioned matters. The two docketed proceedings concern Western Union's rates and rate structure for telex and TWX service to both the public and other interconnected carriers. As a result of these proceedings the interconnected carriers are required to reimburse Western Union for prior discounts which the Commission found to be unwarranted.[1] The specific amount of the reimbursement currently is in dispute. Therefore, in its *Reconsideration Order* the Commission directed Western Union to file a formal complaint seeking payment of the amounts it claims are due and owing. The proceeding in the FCC File No. E-87-140 is a complaint filed by Western Union pursuant to that order.

2. In their motion, the parties state that they agreed to release and discharge each other from all claims arising from the above-captioned proceedings. The motion requests that the Commission terminate those proceedings insofar as they involve claims between MCII/WUI and Western Union and declare that neither will have any obligation to the other arising out of any of the orders that the Commission has issued or may issue in those proceedings or any order that has been issued or may issue in any judicial proceeding arising from these Commission proceedings.

3. We have reviewed the motion and find that the public interest will be served by granting it.[2] This finding is premised, *inter alia*, on the fact that this agreement will not in any way affect either Western Union's or MCII/WUI's relationship with or claims against any other party in the above-captioned proceedings.

4. Therefore, IT IS ORDERED that the Joint Motion for Order Terminating Proceedings filed by Western Union Corporation, MCI International, Inc., and Western Union International, Inc., IS GRANTED.

5. IT IS FURTHER ORDERED that all claims between Western Union Corporation and MCI International, Inc., and Western Union International, Inc., in CC Docket No. 78-79, Phase I, CC Docket No. 78-97, Phase II, and CC Docket No. 82-122 ARE DISMISSED.

6. IT IS FURTHER ORDERED that the complaint of Western Union Telegraph Company against MCI International, Inc. and Western Union International, Inc., File No. E-87-140, IS DISMISSED.

7. IT IS FURTHER ORDERED that the cross-complaint of MCI International, Inc. and Western Union International, Inc., against Western Union Corporation IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* Western Union Telegraph Co., CC Docket No. 78-97, Phase I, 102 FCC 2d 485 (1985), *recon. denied*, 1 FCC Rcd 829 (1986); Interconnection Arrangements Between and Among the Domestic and International Record Carriers, CC Docket No. 82-122, Western Union Telegraph Co., CC Docket No. 78-97, Phase II, Memorandum Opinion and Order, FCC 86-190 (released May 2, 1986) (*Reimbursement Order*), *recon.*, 2 FCC Rcd 2999 (released May 21, 1987) (*Reconsideration Order*).

[2] The Commission has already permitted a settlement in these proceedings between Western Union and ITT World Communications Inc. and between Western Union and RCA Global

Communications, Inc. *See* Western Union Telegraph Co., 2 FCC Rcd 2548 (1987); Western Union Telegraph Co., 3 FCC Rcd 1042 (Com. Car. Bur. 1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

David A. Davila,
Nicasio O. Flores
and Maria Norma Flores
Transferors

and File No. BTCCT-890929KK

Telemundo Group, Inc.,
Transferee

For Transfer of Control of
Nueva Vista Productions, Inc.,
Permittee of Station KVDA(TV),
San Antonio, Texas

MEMORANDUM OPINION AND ORDER

Adopted: August 9, 1990; Released: August 10, 1990

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it: (1) an application for transfer of control of Nueva Vista Productions, Inc., permittee of commercial television station KVDA-TV, Channel 60 (Ind.), San Antonio, Texas, from David A. Davila, Nicasio O. Flores and Maria Norma Flores (Nueva Vista) to Telemundo Group, Inc. ("Telemundo"); (2) a Petition to Deny and Supplement filed by Edward L. Gonzalez ("Gonzalez"); (3) informal objections filed by the Mexican American Legal Defense and Educational Fund, the National Hispanic Media Coalition ("NHMC"), George A. Tejadilla ("Tejadilla"), and the League of United Latin American Citizens ("League"); (4) oppositions filed by the Nueva Vista and by Telemundo; (5) the petitioner's reply; and (6) various other pleadings.

BACKGROUND

2. From the record, the relevant, uncontroverted facts appear as follows. In 1987, Nueva Vista was one of five competing applicants for a construction permit to operate a commercial television station on Channel 60 in San Antonio, Texas. On June 18, 1988, grant of Nueva Vista's application, after a comparative hearing, had been affirmed by the Commission's Review Board, but appeals of the Review Board's decision to the full Commission had been filed by the four losing applicants.

3. On March 28, 1988 Nueva Vista and Telemundo signed a letter of intent whereby they confirmed their understandings regarding various transactions between them ("March LOI").[1] Pursuant to the March LOI, Telemundo agreed to provide funding for the construction and initial operation of Channel 60 in an amount based upon budgeted costs, including a management fee of $5,000 per month to David A. Davila ("Davila"), president and controlling stockholder of Nueva Vista, for his full-time services in overseeing construction and initial program tests at the station. The construction loan was to be secured by a lien on Nueva Vista's assets, except FCC licenses, and included a pledge of Nueva Vista's stock. Further, pursuant to the March LOI, Telemundo would have a "call" option to acquire, and Nueva Vista would have a "put" option to sell, all of Nueva Vista's stock for $1.5 million, subject, by its terms, to FCC approval. The March LOI also contained a provision whereby Telemundo would provide a specified amount of Spanish language programming to Nueva Vista, which Nueva Vista was free to reject on reasonable grounds. The March LOI was conditioned on, among other things, execution of definitive agreements between Telemundo and Nueva Vista within 45 days of the March LOI, and execution of settlement agreements between Nueva Vista and all of its competing applicants within 15 days. All the Board members of Nueva Vista, including Gonzalez, and Telemundo signed the March LOI. The March LOI expired on April 12, 1988 because Nueva Vista was unable to effectuate settlement with all its comparative competitors within the 15-day time period.

4. On June 8, 1988, Telemundo and Nueva Vista signed a revised letter of intent ("June LOI"). By its terms, the June LOI recognized the intent of SAT Corp., a subsidiary of Telemundo, to provide funding in the amount of $950,000 to be used by Nueva Vista to settle its pending contested Commission Channel 60 proceeding with three of the four remaining competing applicants.[2] The terms were similar to those in the March LOI, except that rather than the put/call option contained in the March LOI, the June LOI provided that immediately following execution of the June LOI and continuing for a period of 18 months after commencement of broadcast operations, SAT Corp. would have a right of first refusal with respect to the purchase of any and all of Nueva Vista's stock.[3]

5. On July 19, 1988, before the Commission approved Nueva Vista's requested settlements with all of its comparative challengers, SAT Corp. executed a definitive agreement with Nueva Vista to provide Nueva Vista a loan, secured by a pledge of Nueva Vista's stock, so that Nueva Vista could settle the pending comparative hearing with all of the competing comparative applicants except SABI ("Settlement Loan Agreement"). This agreement did not contain a put/call option provision and it was signed by Gonzalez. Subsequent to its execution, Nueva Vista was able to settle its dispute with SABI, the last remaining comparative challenger, and the Commission approved all of the settlements by final order on August 31, 1988.

6. On October 21, 1988, SAT Corp. and 85% of the Nueva Vista shareholders executed another loan agreement, the terms of which were similar to the March LOI providing a construction loan, put/call option provision, and pledge of Nueva Vista stock as security, among other things ("Construction Loan Agreement"). Gonzalez did not sign this agreement. Nueva Vista filed the October 21, 1988 option and pledge agreements, executed pursuant to the Construction Loan Agreement, with the Commission on December 1, 1988. Nueva Vista's construction permit was issued on July 27, 1989 and Station KVDA went on the air on September 10, 1989.

PLEADINGS

7. Gonzalez argues in his petition to deny that approval of the proposed transfer of control of KVDA-TV would not be in the public interest for three reasons: (1) the applicants failed to disclose adequately to the Commission the series of understandings, letters of intent and agreements outlined above, in violation of Sections 1.65 and/or 73.3613 of the Commission's Rules; (2) Telemundo exercised control of Nueva Vista without Commission authorization, both in negotiating Telemundo's loans to Nueva Vista and during the course of station KVDA's construction; and (3) Telemundo's Model EEO Program, submitted as a requisite exhibit to the subject transfer application, is deficient.

8. Specifically, Gonzalez argues that Nueva Vista was required by Section 1.65(a) of the Rules to amend its construction permit application to disclose both the March LOI and the June LOI because the terms of those letters of intent rendered information submitted in Nueva Vista's pending construction permit application substantially changed.[4] Gonzalez states that the fact that Telemundo used the name of its subsidiary, SAT Corp., as the signatory to the June LOI, indicates that Nueva Vista intentionally failed to disclose the March and June letters of intent to the Commission. In an affidavit, Gonzalez states that he was told by Nueva Vista's attorney that the name "SAT Corp." was used to keep Nueva Vista's opponents from discovering that Telemundo was financing the settlement and that Telemundo would have an option to buy. Gonzalez also alleges that Nueva Vista lacked candor in filing its Joint Request for Approval of Settlement on July 1, 1988, because it failed therein to report to the Commission that it had given Telemundo an option to purchase all its stock and had pledged its stock as security. Gonzalez also argues that Nueva Vista violated Section 1.65(a) of the Rules by failing to disclose to the Commission the July 19, 1988 Settlement Loan Agreement, which, Gonzalez notes, was executed more than a month before the Commission approved Nueva Vista's requested settlements with its comparative challengers and granted its construction permit. Moreover, Gonzalez states that once Nueva Vista closed on the settlement agreements with its competitors and was issued a construction permit, its failure to disclose the July 19, 1988 agreement was a violation of Section 73.3613(b)(3)(iii) of the Rules as well.[5]

9. Next, Gonzalez argues that Telemundo, the transferee of the subject transfer application, exercised control of KVDA prior to requesting or receiving Commission authority to do so. In this regard, Gonzalez makes several allegations. First, Gonzalez claims that only Leonard Forman, a Telemundo official, negotiated the terms of his 1988 employment contract as corporate secretary of Nueva Vista. In support of his affidavit making this claim, Gonzalez submits the employment agreement, which is signed by Forman, Davila, of Nueva Vista, and Gonzalez. Gonzalez also submits a letter concerning the employment agreement from Forman to Gonzalez, dated March 21, 1988. Second, Gonzalez alleges that Telemundo alone selected Arthur Emerson as the general manager for KVDA, announced his selection to the public, and further controlled the selection of other key employees. In support of these allegations, Gonzalez' affidavit states that Emerson was hired subsequent to an interview in New York where Telemundo has offices. Third, Gonzalez asserts that Telemundo handled all budgeting, selection of equipment and arrangements with contractors and landowners. Gonzalez supports this assertion with a letter, dated March 1, 1988, to him from Nueva Vista's lawyer, wherein the lawyer states that these functions would be handled by the same broadcast consultant who had overseen the construction of Telemundo's Houston/Galveston TV station. Inasmuch as the letter also indicates that Davila would have to be "a liaison," Gonzalez argues that this characterization is tantamount to an acknowledgement that Davila was merely a figurehead and that Telemundo would take care of everything. Gonzalez also submits the affidavit of Henry Jesse Farias who states that on November 6, 1989, he had a telephone conversation with Alfredo Sanchez, the owner of Sanchez Heating and Air Conditioning and general contractor at KVDA. Farias states that Sanchez told him that the contact person for hiring contractors at KVDA was in New York and further that Sanchez affirmed that the contact person was from Telemundo. Gonzalez also alleges that Telemundo dispatched an agent to San Antonio to obtain the tower site and that all of the funds placed in Nueva Vista's corporate checking account were Telemundo funds. Lastly, Gonzalez states that Davila, who had moved to the Rio Grande Valley years before, returned to San Antonio in late 1988 and for many months was living and working out of a motel only because Telemundo had agreed to pay him $5000 per month as a consultant to KVDA.

10. Finally, with respect to the Model EEO Program submitted by Telemundo with its transfer application, Gonzalez alleges that it demonstrates that Telemundo has not made reasonable efforts to ascertain the needs of the community in order to fulfill its programming obligations. In this regard, Gonzalez states that because Telemundo's Model EEO Program lists, as recruitment sources, only one general employment service, and no local employment agencies, area schools and colleges, or media sources directed to minorities, the program is therefore deficient.

11. In its informal objection, the League of United Latin American Citizens, supported by the affidavit of its national president, Jose Garcia de Lara, objects that Telemundo has taken control of KVDA before the Commission has authorized the it to do so. The League also argues that since Nueva Vista is presently controlled by minorities, Hispanics should have an opportunity to buy the station instead of Telemundo.

12. Tejadilla, who was a consultant to one of Nueva Vista's competitors in the comparative hearing proceeding, SABI, argues in his informal objection that it was unlawful for Nueva Vista not to report in 1988, when Nueva Vista was negotiating the settlement agreements, pertinent facts contained in the various agreements entered into between Nueva Vista and Telemundo. Specifically, Tejadilla states that when Nueva Vista and SABI were involved in settlement negotiations in late July to August, 1988, the name of Telemundo was never mentioned and SABI was reassured that local investers would operate the station. Tejadilla states that this assurance was a material factor in SABI's decision to settle on August 10, 1988, on the terms offered by Nueva Vista because if it had known that a more sustantial financial party was involved, it would have held out for more money in settlement.

13. The Mexican American Legal Defense and Educational Fund, MALDEF, argues in its informal objection that Telemundo has been unresponsive to Hispanics in its

operation of another television station, KVEA, Los Angeles, California, by providing almost no public affairs or public service programming. It notes that KVEA has only one Hispanic, its general manager, who has failed to support Hispanic community organizations and that the holding company of Telemundo, Reliance Capital Group L.P., has no Hispanic Board Member. MALDEF argues that Telemundo terminated 10 Hispanics within the last six months and replaced them with non-Hispanic employees at KVEA and has chosen an Anglo as general manager of KVDA even though San Antonio is 58% Hispanic. Moreover, Herrera notes that there is only one Latino on Telemundo's Board of Directors even though it claims to serve Spanish-speaking communities.

14. In their opposition to Gonzalez' petition, Nueva Vista and Telemundo state that the March LOI expired on April 12, 1988, because SABI had refused to settle within the 15-day period set by the March LOI. Thus, they argue, it expired well before any Commission reporting requirement ripened. Further, as confirmed by the declaration of Peter J. Houseman, II, Senior Vice President and Chief Financial Officer of Telemundo, Davila notes that the purpose of the June LOI was only to confirm the parties' understandings concerning a loan to finance partial settlement of the still pending Channel 60 comparative proceeding and a right of first refusal, rather than to establish any put/call stock option. The put/call option had been dropped from the original draft. Thus, Nueva Vista and Telemundo argue that there was no Commission requirement that Nueva Vista report the terms of this letter. Further, Nueva Vista argues, the June LOI was not a pledge agreement with Telemundo, but rather, only a letter of intent to enter a pledge agreement. Nueva Vista also notes that at the time, FCC Form 301 required stock pledge agreements to be submitted only under certain circumstances.

15. Nueva Vista also argues that the name "SAT Corp.," Telemundo's subsidiary, was used in order to keep SABI, its only competitor that had not settled, from finding out the identity of Nueva Vista's lender and was used with the full approval of Gonzalez. Nueva Vista states that this strategy was used to negotiate a better deal with SABI who might have otherwise perceived Telemundo as a "deep pocket" and that such a strategy evidences no other motive. Additionally, Nueva Vista states that since there was no option agreement in the June LOI, there was nothing to hide by the use of the name "SAT Corp." Telemundo adds that the Commission does not require the identification of a lender's parent company.

16. Nueva Vista next argues that because the July 19, 1988 Settlement Loan Agreements between SAT Corp. and Nueva Vista contained no stock option provision, they, like the June LOI, were not required to be reported pursuant to Section 1.65 of the Rules. Nueva Vista also notes that stock pledge agreements are not required to be reported pursuant to Section 1.65 of the Rules. Moreover, Nueva Vista argues that Section 73.3525 does not require that such agreements be reported in petitions for approval of settlements.

17. With respect to the October 21, 1988 Construction Loan Agreement, Nueva Vista states that this was the first agreement to provide for a put/call option and loan for construction and initial operation of station KVDA. Nueva Vista notes that this agreement was filed with the Commission pursuant to Section 73.3613(b) of the Rules on December 1, 1988. Nueva Vista admits that its filing of the Construction Loan Agreement was about 10 days after the 30-day period provided in the rule. However, Nueva Vista argues that it nonetheless substantially complied with the rule given that its application had been approved only three months before, and that as of December 1, 1988, the construction permit still had not been issued and no call letters had been assigned. Nueva Vista also admits that it should have filed its July 19, 1988 stock pledge agreement once its application was granted on August 31, 1988, but states that its filing was overlooked during the intense settlement negotiations. It subsequently filed the stock pledge agreement on November 24, 1989. Telemundo states that since it was not the permittee, it was not required to disclose anything until the transfer application was filed. However, it notes that nonetheless, once it entered into the Construction Loan Agreement, it made various disclosures of its relationship with Nueva Vista, including amendments of its ownership reports on file with the FCC, documents required at the SEC, company press releases and statements in its annual report to shareholders.

18. Nueva Vista and Telemundo also respond to Gonzalez' argument that Nueva Vista relinquished and Telemundo exerted control of station KVDA without Commission authority. In this regard, they first argue that because Gonzalez was an outsider since October, 1988, he therefore does not have the personal knowledge of Nueva Vista's affairs required to sustain a petition to deny under Section 309(d)(1) of the Rules. In contrast, Davila states in an affidavit that he has been involved in Nueva Vista's activities since August of 1988. They also state that the affidavit of Henry Jesse Farias, submitted in support of Gonzalez' petition is unreliable because it is hearsay and does not purport to be based on personal knowledge.

19. Further, Davila states that while Doug Lung, a Telemundo engineer, came to San Antonio a few times, it was Davila, and not any agent of Telemundo, who located and selected the transmitter site, with the help of a local realtor and architectural firm, and signed all contracts and documents. In support of this contention, Nueva Vista submits a statement by Ben Ulcak, a local realtor, who states that he located the property and was contacted and supervised by only Davila. Nueva Vista also submits the statement of Paul Kinnison of Kinnison & Associates, stating that they were the architects hired by Davila and that they received directions only from Davila and Edmund Reid, Davila's broadcast consultant. This is confirmed by Peter J. Houseman II, Senior Vice President and Chief Financial Officer of Telemundo Group, Inc., who states that Telmundo did not detail anyone to San Antonio. Further, Houseman's declaration states that Nueva Vista specifically rejected Telemundo's suggestion to hire an FAA consultant to speed air space clearance.

20. Davila additionally asserts that he personally hired Edmund Reid to assist in planning the construction of KVDA. Davila states, and Houseman confirms, that while Reid was recommended to Davila by Nueva Vista's lawyer, his decision to hire Reid was based on Reid's good track record and the fact that he had previously supervised the construction of another Telemundo-affiliated station. With respect to other hirings at the station, Nueva Vista concedes that Telemundo officials met with KVDA's general manager, Arthur Emerson, and other key employees before they were hired. However, Davila and Houseman state that Davila interviewed them, made the final decision to hire them, and set the terms of their

employment. Davila's letter to Emerson offering him the position was submitted by Nueva Vista in support of this assertion. Davila also notes that Len Forman of Telemundo merely referred Emerson to Davila and moreover, that Telemundo had nothing to do with the selection and hiring of Nueva Vista's other 28 KVDA employees. Houseman further notes that Telemundo made no public announcement concerning the hiring of Emerson. Additionally, as Davila and Houseman state, Davila hired all contractors for the construction at KVDA. In support of this statement, Nueva Vista submits the statement of Alfredo Sanchez, who states he served as Nueva Vista's contractor and that his contacts were only with Davila, Kinnison & Associates and Ed Reid. Sanchez also states that in early November 1989 he was visited in his office by Farias who asked him who had paid him for jobs at KVDA. Sanchez states that he refused to give Farias that information and that Farias did not ask him who was hiring contractors. Sanchez also states that by the time Farias talked to him, all the projects at KVDA had been completed and therefore there was no reason for him to advise Sanchez about future jobs. Further, Davila and Forman state, with regard to Gonzalez' employment contract, that Forman actually negotiated Gonzalez' contract because Davila did not want to deal with Gonzalez and Gonzalez in turn wanted to deal directly with Telemundo. They explain that Davila was angry with Gonzalez for jeopardizing Nueva Vista's dealings with Telemundo in an effort to extort personal benefits, such as a favorable employment contract. Davila and Forman also note that they worked closely with each other and with Nueva Vista's attorney, and after the contract was reduced to writing, it was approved by the Nueva Vista Board, offered by Nueva Vista, not Telemundo, and signed by Davila.

21. Finally, with respect to the issue of control, Nueva Vista and Telemundo note that the $5000 per month fee paid to Davila, which was a budgeted item in the Construction Loan Agreement, made it possible for Davila to be on the scene and take personal charge of KVDA's construction. Telemundo confirms that Davila was not on Telemundo's payroll. Nueva Vista states that Davila signed all checks on Nueva Vista's account. Davila also notes that it was he and Reid alone who developed the station's budget and contracted for all equipment and services needed.

22. Telemundo further rejects Gonzalez' statement that its Model EEO Program, submitted with the subject transfer application, was deficient. Telemundo notes that the form only requires listings of examples of recruitment sources, which it provides for every category, including employment agencies, media sources and colleges, some of which it argues are in fact directed at the minority population. Telemundo also filed an amendment with a more extensive listing of sources on November 22, 1989.

23. Nueva Vista responds to the informal objection of Tejadilla by noting that SABI, who employed Tejadilla as a consultant, received $135,000 in return for dismissal of its competing application and that using the name "SAT Corp." was a proper negotiating strategy.

24. Nueva Vista and Telemundo also respond to the informal objection of NHMC, stating that it is merely a summary support of Gonzalez' petition with no corroborative evidence and does not cite any violations of Commission Rules. They further note that the general manager at KVDA is Hispanic, contrary to NHMC's allegation, and that any complaints about Telemundo's station KVEA in Los Angeles are irrelevant to the subject transaction. Telemundo further states inasmuch as LULAC and MALDEF argue that the FCC should consider whether the public interest would be better served by the proposed assignee or someone other than the proposed assignee, Section 310 precludes the Commission from this consideration.

25. Based on the foregoing arguments, petitioners request that we either deny the captioned transfer application or designate it for an evidentiary hearing. In assessing the merits of a petition to deny, a two-step analysis is required under Section 309(d)(1) and (2) of the Act, as reiterated in *Astroline Communications Co. v. F.C.C.*, 857 F.2d 1556 (D.C. Cir. 1988). The first test is whether the petitioner has demonstrated by specific allegations of fact that grant of the application would be *prima facie* inconsistent with the public interest, convenience and necessity. If such a *prima facie* case is alleged, the second test is whether, based on the entire record, a substantial and material question of fact is presented.

DISCUSSION

Disclosure of Documents

26. With respect to the March and June letters of intent, we note that the FCC Form 301 currently requires, and required at the time Nueva Vista filed its construction permit application, the disclosure of, among other things, contracts or "understandings" related to ownership or future ownership rights. While we do not require disclosure of preliminary negotiations, it is sometimes unclear whether a particular document or oral agreement embodies the type of understanding requiring disclosure. It appears from the record that the March LOI contained a put/call option provision and the June LOI contained both a right of first refusal and a stock pledge provision. In addition, both letters were drafted with considerable specificity and indicated that they constituted the agreements and understandings of the parties. Thus, we note, under these circumstances, that both letters contained the type of "understandings" that substantially changed information in Nueva Vista's construction permit application, thereby invoking the amendment requirement of Section 1.65(a). *Cf. Kickapoo Prairie Broadcasting, Inc.*, 15 F.C.C. 766, 768-69 (1951). However, we also note that the March LOI expired before the 30-day reporting period set forth in Section 1.65(a), leaving Nueva Vista with nothing to disclose. Accordingly, we find that Nueva Vista need only have disclosed the June LOI pursuant to Section 1.65(a) of the Rules. We also find that the October 21, 1988 Construction Loan Agreement, including a stock option provision, was required to be submitted to the Comission pursuant to Section 73.3613 of the Rules within 30 days of its execution, which Nueva Vista admittedly did not do.[6]

27. While we find that Nueva Vista has not technically complied with our rules, as noted above, we do not believe that sanctions are warranted. Our decision is based on the fact that the record is devoid of any evidence of willful or intentional failure to disclose. In this regard, we are unpersuaded that Telemundo's use of the name of its subsidiary, "SAT Corp.," in its negotiations with Nueva Vista and in Nueva Vista's dealings with SABI, evidences an intent to withhold information from the Commission,

as Gonzalez suggests.[7] Rather, it appears that the failure to disclose the June LOI was due to Nueva Vista's reasonable misunderstanding of our Rules. With respect to the Construction Loan Agreement of October 21, 1988, it appears that its initial nondisclosure was due merely to inadvertence and the agreement was in fact disclosed by Nueva Vista only 10 days after the 30-day period set forth in Section 73.3613 of the Rules. *See Loudon County Broadcasting, Inc.*, 5 F.C.C. 2d 574 (1967).

Control of Station KVDA

28. Section 310(d) of the Communications Act of 1934, as amended (47 U.S.C. Section 310(d)) prohibits the transfer of a construction permit or station license without prior Commission consent. We have often recognized that there is no exact formula by which "control" of a broadcast authorization can be determined. In determining whether a transfer of control has occurred, we have traditionally looked beyond the legal title to whether there are any actions reflecting a new entity or individual with the right to determine the basic policies and ultimate control of the station. *See WHDH, Inc.*, 17 F.C.C. 2d 856 (1969), *aff'd sub nom. Greater Boston Television Corp. v. F. C. C.*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). In most instances, the question of control involves an issue of fact that must be resolved by the specific circumstances presented. *See, e.g., Stereo Broadcasters, Inc.*, 55 F.C.C. 2d 819, 821 (1975). Nevertheless, over the years, the Commission has established certain guidelines in this area, including whether control of the station's finances, its personnel, and its programming have shifted to a new entity or individual. While the *sine qua non* of control is the ability of the permittee or licensee to exercise full responsibility over all matters involving the construction and operation of the station, we have held that the day-to-day operations by an agent or employee, when guided by policies set by the licensee or permittee, is not inconsistent with the Communications Act. *See Alabama Educational Television Commission*, 33 F.C.C. 2d 495, 508 (1972). Even if we assume that Gonzalez has stated a *prima facie* case regarding the issue of control, the question that would remain is whether there is a substantial and material question of fact as to whether Telemundo controlled KVDA without authority. We find that there is not.

29. With respect to the hiring of employees, it appears from the record that regardless of whether Telemundo met with any KVDA employees or not, the ultimate authority to hire them resided in Davila, the president and 51% shareholder of Nueva Vista.[8] *See Radio WAVS, Inc.*, 92 F.C.C. 2d 1037, 1049 (1982). First, Gonzalez submits his employment contract, which is signed by both Len Forman of Telemundo and by Davila of Nueva Vista, to support his contention that it was Len Forman of Telemundo who negotiated it with him. On its face the contract demonstrates that Gonzalez' employment was offered by Nueva Vista and that Davila's approval was necessary. Moreover, Gonzalez does not refute Nueva Vista and Telemundo's argument, supported by the affidavits of Davila and Forman, that Davila, who was too angry with Gonzalez to deal with him directly, nonetheless remained informed and in control at all times. Second, Gonzalez' only support for his allegation that Emerson, the station's manager, was interviewed and hired by Telemundo appears to be his own statement, which does not appear to be based on his personal knowledge. While Forman's affidavit confirms that he met with Emerson prior to his being hired, there is nothing in the record to indicate that such a meeting was required before Emerson could be hired or to indicate that Davila did not exercise final authority. In fact, Nueva Vista submits for the record its letter, signed by Davila, offering Emerson the job. Next, with respect to contractors hired at the station, Gonzalez relies on the affidavit of Henry Jesse Farias, whose relationship with Gonzalez is unclear, stating that Alfredo Sanchez, the general contractor at KVDA, confirmed to Farias that someone at Telemundo was the contact person for hiring contractors at KVDA. However, Farias' affidavit does not indicate who the alleged contact person was, is not supported by any other evidence and is directly refuted by a declaration of Sanchez himself. Sanchez, in his affidavit, denies having told Farias anything related to hiring at KVDA and further indicates that he dealt only with Davila, Kinnison & Associates, who were KVDA's architects, and Ed Reid, who was the Project Engineer at KVDA. Moreover, not only does the record demonstrate that Davila selected and hired the employees and contractors identified by Gonzalez, it is undisputed that Davila was responsible for selecting and hiring the other 28 KVDA employees as well.

30. Gonzalez' remaining allegations concerning Telemundo's alleged control of the station do not appear to be based on personal knowledge and for the most part are uncorroborated. For example, Gonzalez alleges that all budgeting, selection of equipment, and arrangements with contractors and landowners was handled by the same broadcast consultant that oversaw Telemundo's construction in Galveston/Houston. However, Gonzalez' only support for this allegation is a March 1, 1988 letter to him from Nueva Vista's attorney, indicating as much. Not only is the letter dated prior to any actual budgeting, hiring, or selection of equipment, the fact that the same broadcast consultant that worked on a Telemundo-affiliated station (his name was not mentioned in the letter) may also have been hired by Nueva Vista, does not by itself raise a substantial and material question. Moreover, the declarations of Ben Ulcak, a local realtor, and Paul Kinnison, an architect with the firm working at KVDA, indicate that they were selected by and dealt directly with Davila.

31. In sum, the only relevant allegation by Gonzalez that appears to be based on personal knowledge relates to his employment contract, which he states was negotiated by Len Forman. While this tends to show some involvement by Telemundo in Gonzalez' contract negotiation, we find that even if true, this fact alone is not dispositive nor does it raise a substantial and material question concerning Telemundo's alleged control. The greater weight of the record indicates that Davila, the majority shareholder and an employee of Nueva Vista, controlled the day-to-day operations at the station and made all final decisions. Further, other facts appearing in the record indicate lack of control by Telemundo. For example, the fact that Nueva Vista rejected Telemundo's suggestion to hire an FAA consultant to speed air space clearance suggests that Nueva Vista was in control. *See Radio WAVS*, 92 F.C.C. 2d at 1044. Thus, we are fully persuaded that the record does not raise a substantial and material question concerning unauthorized control by Telemundo.

Telemundo's Model EEO Program

32. We find that Telemundo's originally filed Model EEO Program was sufficient. As the application plainly requires, Telemundo submitted examples of its recruitment sources, including the Texas Employment Commission, the University of Texas/San Antonio and San Antonio College, which likely have significant minority enrollments, the *San Antonio Light* and the *San Antonio Express/News*, as media sources with significant circulation among minorities and women. Telemundo's dedication to recruiting minorities and women, is further made clear by its amendment listing the additional recruitment sources it intends to utilize. Thus, we find so substantial and material questions exist regarding Telemundo's Model EEO Program.

THE INFORMAL OBJECTIONS

33. Except as noted below, we find that the matters raised by the informal objections have been addressed already with respect to Gonzalez' allegations. In addition, with respect to NHMC's challenge of Telemundo station KVEA-TV's responsiveness to the Hispanic community in the Los Angeles area, we find it has failed to set forth any facts which, if true, would raise a *prima facie* case regarding Telemundo's obligation to provide programming responsive to the issues confronting the community.

CONCLUSION

34. Accordingly, based on the foregoing, we find that the petitioner and informal objectors have failed to raise a substantial and material question of fact requiring resolution in a hearing. We further find that the applicants herein are fully qualified and grant of their applications serves the public interest, convenience and necessity.

35. IT IS ORDERED, That the petition to deny filed by Edward L. Gonzalez and the informal objections filed by Mexican American Legal Defense and Educational Fund, the National Hispanic Media Coalition, George A. Tejadilla, and the League of United Latin American Citizens, ARE DENIED.

36. IT IS FURTHER ORDERED, That the application transferring control of Station KVDA, Channel 60, San Antonio, Texas from Nueva Vista Productions, Inc. to Telemundo Group, Inc. (File No. BTCCT-890929KK) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Services Division

FOOTNOTES

[1] Gonzalez originally stated his belief that the Letter of Intent was executed on March 8, 1988, but later conceded that its execution date may have been March 28, 1988, as noted by Nueva Vista and Telemundo.

[2] San Antonio Broadcasting, Inc. ("SABI") was the only competitor that had not agreed at this stage to settle with Nueva Vista.

[3] Initially, Gonzalez stated in his petition to deny that the June LOI merely tracked the language of the March LOI, but later in his reply appears to acknowledge that the provision was a right of first refusal, rather than a put/call option, and that the June LOI was intended to provide a settlement loan, rather than a construction loan. The June LOI was signed by Gonzalez.

[4] Section 1.65(a) of the Rules provides in pertinent part that "whenever the information furnished in the pending application [or in Commission proceedings involving a pending application] is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, amend... his application so as to furnish such additional or corrected information as may be appropriate."

[5] Section 73.3613(b)(3)(iii) provides in pertinent part that a licensee or permittee of a commercial television station must file with the FCC within 30 days of execution thereof any "[c]ontracts, instruments or documents relating to the present or future ownership or control of the licensee or permittee or to the licensee's or permittee's stock, rights or interests therein, or relating to changes in such ownership or control . . . ."

[6] There was no necessity for Nueva Vista to disclose the July 19, 1988 Settlement Loan Agreement, as its only provision conceivably affecting ownership rights was a stock pledge provision, the existence of which Nueva Vista had previously disclosed in its construction permit application. Nor was Nueva Vista required to submit the Settlement Loan Agreement within 30 days of its execution, pursuant to Section 73.3613, as Nueva Vista was not a permittee or licensee at that time.

[7] We are also unaware of any Commission precedent or rule precluding the use of a subsidiary's name under such circumstances.

[8] Gonzalez makes a reference to a $5000 fee that Davila was receiving for his activities at the station. However, it appears that he is merely referencing an expense that was budgeted in the loan agreements as he has not submitted any documentation to indicate that Davila was on Telemundo's payroll. The fact, noted by Gonzalez, that Davila moved from Rio Grande to live in a San Antonio hotel, is simply irrelevant.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-57

In the Matter of

Review of Sections 68.104
and 68.213 of the
Commission's Rules Concerning
Connection of Simple Inside Wiring
to the Telephone Network

and

Petition for Modification RM-5643
of Section 68.213 of
the Commission's Rules
Filed by the Electronic Industries
Association

ORDER

Adopted: August 10, 1990; Released: August 13, 1990

By the Deputy Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In its *Report and Order and Further Notice of Proposed Rule Making* in CC Docket No. 88-57, RM-5643, FCC 90-220, released June 14, 1990 (*Order*), summarized at 55 Fed. Reg. 28628 (July 12, 1990), the Commission adopted amendments to Sections 68.3, 68.104, 68.108 and 68.213 of the rules concerning the terms and conditions under which customers may connect simple inside wiring to the telephone network. The amended rules are scheduled to take effect on August 13, 1990. This order addresses nine requests that, variously, seek deferral, stay or waiver of that date. For the reasons discussed below, we deny the requests.[1]

II. BACKGROUND

2. The *Order* liberalized the terms and conditions set forth in Sections 68.3, 68.104, and 68.213 of the Commission's Rules under which customers may access the telephone network and connect simple inside wiring.[2] The Commission found that the previous requirement in Section 68.104 that customers connect simple inside wiring only through carrier-installed jacks had been a reasonable precaution to prevent network harm in 1984 when customers were first permitted to connect simple inside wiring to the telephone network. However, the Commission determined that its experience since 1984 had made clear that additional subscriber options for connection to the network could be provided without significant risk of network harm. The Commission amended Section 68.104 to provide that customers could access the network by direct connection to carrier-installed wiring such as by severing such wiring and attaching a standard network jack.

3. The Commission additionally addressed carrier practices of placing the demarcation point at a location substantially within the customer's premises. Since the customer is not ordinarily permitted to access carrier facilities beyond the demarcation point, this had the effect of precluding customer access to wiring on the customer's premises. In view of the Commission's determination that customers could directly access carrier-installed wiring the Commission found that carrier establishment of the demarcation point at a substantial distance within the customer's premises frustrated the customer's ability and right to connect to the network. The Commission accordingly modified the definition of the demarcation point to provide that in most instances, for both new and existing situations, it would be within 12 inches from where wiring enters the customer's premises. The Commission stated that the revised demarcation point would apply to connection of both simple and complex wiring. The Commission additionally recognized that the revised definition could affect treatment by carriers of activities on the customer side of the demarcation point. The Commission stated that the revised demarcation point "determines the point on the customer side of which any carrier activity is, and will be, subject to the Commission's previous and future determinations in CC Docket 79-105 and other proceedings, under the guidance of *NARUC v. FCC*, concerning the appropriate regulatory treatment by carriers of such activity." *Order*, n. 25.

III. CONTENTIONS

4. Petitioners generally argue that they cannot implement the new rules by August 13, and that there is increased risk of network harm by the new rules. For these reasons, BellSouth, GTE, TIA, and USTA [3] seek stay of the Commission's *Order*, and USWC seeks a limited waiver of the rules.[4]

5. Ameritech and USWC argue that time is needed to comprehend the *Order*, assess the degree to which the amendments impact its provisioning of current and contemplated services, and determine how to accommodate that impact to comply with Part 68 as amended. USWC Petition at 3. Ameritech, GTE, Joint Petitioners, TIA, USTA, and USWC claim that it would be impossible for all exchange carriers to implement the changes required by the new rules by August 13. New operating procedures for inside wiring, installation and time reporting by employees, employee training programs, accounting support systems, modified tariffs, consultation with state regulators to resolve possible inconsistences with existing state regulations require more time, they urge. They also state that time is required to educate consumers.

6. BellSouth, GTE, TIA and USWC also variously argue that certain aspects of the *Order* should be clarified, *e.g.*, the terms "premises" and "minimum point of entry" require guidance to prevent harm in structures with common walls, and the meaning of the term "any" as it relates to additions, modifications and rearrangements of existing wiring; the rules are confusing as to their effect on various different types or classes of wiring; there may be conflicts created between provisions of the National Electric Code and the new rule regarding protection at or about the premises property line; failure to stay the *Order*

will lead to state actions to re-regulate inside wiring; and the *Order* violates the Administrative Procedure Act, 5 U.S.C. § 553, because the Commission did not provide adequate notice that its Notice of Proposed Rule Making, 3 FCC Rcd 1120 (1988), (Notice) contemplated application of the proposed rules to complex wiring.

7. Joint Petitioners' Motion asserts that the current implementation date would subject customers to obligations that they are not prepared for and do not understand. Motion at 4-5. It also claims that time is needed to print schedules, mail them, set up for customer call-ins, receiving and responding to customers' questions, which would result in delays well beyond August 13. It adds that special issues associated with various services include how placement of network channel terminating equipment on customers' premises is affected and how that placement will affect maintenance and service; how service will be maintained if the existing network interface must be distant from the demarcation point; how the carrier can insure that proper signal power levels are being maintained, if the carrier does not control the premises wiring between the data jack and the demarcation point; and how existing contractual obligations are affected. Joint Petitioners' Motion at 6-7.

8. According to USWC, development of new practices and training programs involves considerable dissemination of information to engineering, construction, installation and maintenance personnel, as well as marketing personnel who must review USWC products and services to understand the service termination points and rates that should be charged. USWC Petition at 4-5. GTE claims that the situation regarding inside wiring "will go into turmoil" if the rules go into effect on August 13. GTE Petition at 10. GTE suggests that the states are in some cases engaged in proceedings to develop inside wiring policies. USWC also urges the Commission to deem carriers reaching the point of initiating contacts with state regulators and seeking tariff changes where needed to be in substantial compliance with the amended rules. USWC at 9.

IV. DISCUSSION

9. Although styled in various ways, in practical effect the pleadings seek either a stay or waiver of the August 13, 1990 effective date of the revised rules. Petitioners rely on similar arguments to support their requests. They argue that allowing customer access in accordance with the revised rules would create risks of network harm and service disruption. They also argue that carriers will be unable to complete by August 13, 1990, the process of developing and implementing the internal practices they claim will be necessary to accommodate customer access pursuant to the amended rules and the revised definition of demarcation point. Some petitioners urge a stay pending reconsideration on the ground that the Commission failed to provide adequate notice of the changes insofar as applicable to complex wiring and therefore violated Section 553(b) of the Administrative Procedure Act.

10. Petitioners' fears of network harm and service disruption reflect concerns similar to those the Commission rejected in the *Order*. There, the Commission carefully evaluated the potential effects of customer access and determined that the benefits of allowing customers direct access to carrier-installed wiring fully outweighed any attendant risks. Petitioners have not shown that there are any substantial risks of network harm or service disruption that might warrant a delay in permitting direct customer access to carrier-installed wiring. To the extent petitioners believe that the Commission's balancing of risks and benefits was incorrect, those contentions may be raised in a petition for reconsideration. We additionally observe that the *Order* does not require any modification of existing service arrangements.

11. We recognize that carriers have not yet completed the process of developing and implementing the practices and procedures they will eventually employ in response to the revised rules by August 13. We believe, however, that this process is well underway and that interim measures will be adequate to permit full compliance with the revised rules. For example, the revised definition of the demarcation point will require field technicians to classify as nonregulated certain functions that they previously classified as regulated. We anticipate that carriers will eventually be able to ensure that their field technicians record their time accurately. To the extent time reporting is unreliable during an interim period, carriers may use reasonable, good faith estimates to apportion field technician time between regulated and unregulated activities.

12. Similarly, the Commission did not require immediate and complete notification to customers of their additional rights to connect inside wiring to the telephone network or of revised telephone company practices. Rather, the *Order* envisions only a continuation of on-going consumer education efforts. The Commission stated that:

> [It] expects carriers to continue to develop and submit to their subscribers, residential and business, informational brochures, or to otherwise provide information such as in telephone directories and billing inserts, describing the rights of subscribers to perform inside wiring operations, including those established in this Report and Order. We further expect carriers at the request of customers to provide complete information on customers' rights to install inside wiring and to fully disclose their standard operating practices concerning location of the demarcation point.

Order at para. 76. The Commission did not state that such notification to customers would have to be accomplished by August 13. It is expected, however, that assimilation of the new rules and dissemination throughout the various carriers' organizations will permit sufficiently detailed responses to customer questions regarding the revised order. We are not persuaded that delay of the August 13 effective date is necessary to ensure that state tariff practices continue to be consistent with the Part 68 rules. In addition, we do not believe that the asserted need to conform state tariff language to the revised rules justifies delay in achieving their public interest benefits.

13. The Bureau is additionally unpersuaded that delay in implementation of the rules is warranted because of alleged violations of the Administrative Procedure Act. The *Notice*, 3 FCC Rcd 1120 (1988) in this proceeding specifically invited interested parties to comment on the extent to which the proposal to allow customers to directly access carrier-installed wiring would require amendment of the definition of the demarcation point. *Notice*, para. 15. Petitioners have not shown that the rule amendments are not within the scope of that notice.

14. As indicated, the Petitioners' requests for relief are variously styled as requests for stay, waiver or deferral. To resolve a stay request, we apply the standards of *Virginia Petroleum Jobbers v. FPC*, 259 F.2d 921 (DC Cir. 1958), (*Virginia*); and *Washington Metropolitan Area Transit Commission v. Holiday Tours*, 559 F.2d 841 (DC Cir. 1977), (*WMATA*). In *Virginia*, the court stated that four factors must be satisfied in order to justify a stay: (1) has petitioner made a strong showing that it is likely to prevail on the merits of its appeal; (2) has the petitioner shown that without a stay it will be irreparably injured; (3) would the issuance of the stay substantially harm other parties interested in the proceeding; and (4) would the stay further the public interest. In *WMATA*, the court reasoned that these criteria could be balanced in some circumstances. Under these standards a stay of the *Order* is not warranted because a strong showing of prevailing on reconsideration has not been made because there has been no showing of irreparable harm or harm to third parties absent a stay and because the planned implementation of the revised rules would serve the public interest. The benefits that will follow expeditious implementation of the new inside wiring rules far outweigh any benefit that might flow from delaying them, in whole or part. To the extent petitioners seek waiver of the revised rules, we apply *Northeast Cellular Telephone Company v FCC*, 897 F.2d 1164 (D.C. Cir. 1990), which permits waiver only if special circumstances warrant a deviation from the general rule and such deviation would serve the public interest. No special circumstances warrant deviation from the August implementation date and, as we have found, the public interest will be served by adhering to that date.

V. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED, That the petitions, motions, and requests before the Bureau ARE DENIED. This action is taken pursuant to authority delegated under Sections 0.91 and 0.291 of the Commission's rules.

16. IT IS FURTHER ORDERED, That this action IS EFFECTIVE ON ADOPTION.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief - Operations
Common Carrier Bureau

APPENDIX

The nine filings are as follows:

(1) Emergency Petition for Stay, filed by GTE Service Corporation (GTE)

(2) Emergency Petition for Stay, filed by User Premises Equipment Division of the Telecommunications Industry Association (TIA)

(3) Petition for Limited Waiver, filed by Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company, doing business as US West Communications (USWC)

(4) Motion for Extension of Time to Comply, filed by Bell Atlantic Telephone Companies (Bell Telephone Company of Pennsylvania, the four Chesapeake and Potomac Telephone Companies, the Diamond State Telephone Company and New Jersey Bell Telephone Company) (Bell Atlantic)

(5) Joint Emergency Motion for Extensions of Time for Compliance with Amendments to Part 68 of the Commission's Rules and Regulations, filed by BellSouth (Southern Bell Telephone and Telephone Company and South Central Bell Telephone Company), Cincinnati Bell Telephone Company, the NYNEX Telephone Companies (New York Telephone Company and New England Telephone and Telegraph Company), Southwestern Bell Telephone Company, Pacific Bell and Southern New England Telephone Company (Joint Petitioners)

(6) Request for Stay, filed by United States Telephone Association (USTA)

(7) Comments, filed by North American Telecommunications Association (NATA)

(8) Emergency Petition for Stay, filed by BellSouth Corporation (BellSouth)

(9) Motion for Extension of Time for Compliance, filed by Ameritech.

FOOTNOTES

[1] *See* Appendix hereto. For convenience, we refer to the parties collectively as Petitioners.

[2] The Commission has defined inside wiring as the customer premises portion of telephone plant which connects station components to each other and to the telephone network. Inside Wiring Reconsideration Order, 1 FCC Rcd 1190, 1197 n.1, *further recon.* 3 FCC Rcd 1719 (1988), *remanded on other grounds* National Association of Regulatory Utility Commissioners v FCC, 880 F.2d 422 (D.C. Cir. 1989) (NARUC v FCC).

[3] BellSouth and TIA seeks a stay of until six months after the Commission rules on their forthcoming petitions for reconsideration of the Order. Other parties seek a stay until January 1, 1990.

[4] *See* Petition for Limited Waiver filed by USWC.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-145

In re Application of

HOWARD G. BILL File No. BPH-880407MU

For Construction Permit for a
New FM Station on Channel 226
in Decatur, Illinois

Appearances

James K. Edmundson, Esquire, and *Pamela C. Cooper, Esquire*, on behalf of Howard G. Bill, and *Gary P. Schonman, Esquire*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

SUMMARY DECISION OF CHIEF ADMINISTRATIVE LAW JUDGE JOSEPH STIRMER

Issued: August 14, 1990; Released: August 20, 1990

PRELIMINARY STATEMENT

1. By *Hearing Designation Order* (DA 90-355) released April 3, 1990, the application of Howard G. Bill (Bill)[1] was designated for hearing on the following issue:

> 1. To determine with respect to Howard G. Bill, whether the applicant is financially qualified.

2. Presently under consideration are a "Motion for Summary Decision" filed by Howard G. Bill (Bill) on July 23, 1990, and the "Mass Media Bureau's Consolidated Comments on Further Motion for Leave to Amend and Motion for Summary Decision" filed by the Bureau on August 1, 1990.

FINDINGS OF FACT

3. In a May 30, 1990, amendment,[2] Bill estimated that he would require $117,000 to construct his proposed station and an additional $27,000 to operate it for three months without revenue. These estimates were based on Bill's prior broadcast experience and were prepared with the assistance of Bill's communications counsel and engineering consultant. To meet these expenses, Bill stated that he was relying upon the proceeds of a business note in the amount of $73,000, and the profits from the operation of Stations KOLM(AM) and KWWK(FM), Rochester, Minnesota, which profits were expected to be $77,000. These stations, in 1989, generated a net income in an amount in excess of $74,000. As a further source of revenue to meet anticipated expenses, Bill stated that he would, if necessary, rely on the fair market value of the two stations which, according to an appraisal provided by Bill, is estimated to have a fair market value of $1.3 million.

4. Following the submission of the May 30, 1990, amendment, Bill was unable to collect on the $73,000 note upon which he had previously relied. As a result, Bill changed his plan of financing.[3] Specifically, Bill now relies upon an equipment lease from Park Leasing Co. of Des Moines, Minnesota, in the amount of $86,268. The arrangement is evidenced by a letter dated June 29, 1990, from Ronald A. Angell of Park Leasing Co. Because Bill is now going to lease rather than purchase the equipment, he has revised his construction and operating costs. Specifically, Bill has revised his construction costs from $117,000 to $30,732. Also, the initial cost of operating the station for three months, assuming no revenue, has been increased from $27,000 to $34,144, which takes into consideration the expense of leasing the equipment. Thus, Bill now estimates that his total construction and operating costs will be $64,876. To meet such costs, Bill is relying upon the future profits of Stations KOLM(AM) and KWWK(FM) and on his own net worth, estimated at $1.5 million. This sum includes the appraised fair market value of the two stations, various real estate holdings, personal property, and cash on hand.

ULTIMATE FINDINGS AND CONCLUSIONS

5. Bill has estimated his costs of construction and operation at $64,876. To meet these costs, Bill relies upon the availability of expected profits from the operation of Stations KOLM(AM) and KWWK(FM) in the amount of $77,000. Based on prior experience, the estimated profits from these stations are reasonable and will be credited. In addition, Bill has a net worth estimated at $1.5 million. Thus, it appears that Bill's net worth is 20 times greater than his revised cost estimate of $64,876. In this connection, it has previously been held that nonliquid assets several times the value of estimated costs would render an applicant financially qualified. *Kaye-Smith Enterprises*, 98 FCC 2d 675 (1984); *International Broadcasting Co.*, 3 FCC 2d 449 (1966).

6. In order to support a motion for summary decision pursuant to Section 1.251, a party must show that there is no genuine issue of material fact for determination at the hearing. *New Broadcasting Corporation*, 44 FCC 2d 386 (1973). Here, Bill has made the necessary showing regarding his financial qualifications, and a hearing on such issue would serve no useful purpose. Therefore, Bill's motion for summary decision will be granted, the financial issue will be resolved in his favor, and his application will be granted.

Accordingly, IT IS ORDERED that the unopposed "Motion for Summary Decision" filed by Howard G. Bill on July 23, 1990, IS GRANTED, and the financial issue IS RESOLVED in favor of Howard G. Bill;

IT IS FURTHER ORDERED that the application of Howard G. Bill (File No. BPH-880407MU) for a construction permit for a new FM station on Channel 226A in Decatur, Illinois, IS GRANTED.[4]

FEDERAL COMMUNICATIONS COMMISSION

Joseph Stirmer
Chief Administrative Law Judge

FOOTNOTES

[1] The application of Decatur Christian Radio, Inc. (Decatur) was also designated for hearing in this proceeding. Pursuant to a "Joint Request for Approval of Agreement" filed by Bill and Decatur, the application of Decatur was dismissed, with prejudice. (*See, Memorandum Opinion and Order* of the Presiding Judge, FCC 90M-1226, released May 17, 1990.)

[2] *See, Order* of the Presiding Judge, FCC 90M-1673, released June 14, 1990, accepting Bill's May 30, 1990, amendment.

[3] Bill's amendment, revising initial operating costs, was accepted by *Order* of the Presiding Judge, FCC 90M-2468, released August 9, 1990.

[4] In the event that exceptions are not filed within 30 days after the release of this Summary Decision, and the Commission does not review the case on its own motion, this Summary Decision shall become effective 50 days after its public release, pursuant to 48 C.F.R. 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NATIONAL
TELEPHONE
SERVICES, INC.
Transferor,

and I-T-C-90-107-TC

TELESPHERE
COMMUNICATIONS, INC.
Transferee,

Application for Authority to Transfer
Control of International Resale
Authorization of National Telephone
Services, Inc.

MEMORANDUM, OPINION AND ORDER

Adopted: August 15, 1990; Released: August 20, 1990

By the Chief, International Facilities Division:

1. On April 24, 1990, National Telephone Services, Inc. (NTS) and Telesphere Communications, Inc (TCI) filed an application requesting authority to transfer the Section 214 international resale authorization of NTS to TCI in connection with the merger of the two companies. No comments were received.

2. The parties state that TCI is a publicly held holding company incorporated in Delaware. TCI, itself, is not a carrier, but a wholly owned subsidiary of it -- Telesphere Network, Inc. (TNI) -- is. TNI has provided a variety of long distance telecommunications services since 1982 and currently operates as a non-dominant international resale carrier pursuant to Commission decision.[1] TNI also provides a variety of domestic interestate long distance services pursuant to the regulatory forbearance policies established in the Commission's *Competitive Carrier* [2] proceeding, the parties state. It is also authorized -- through certification, registration, tariff requirements, or on an unregulated basis -- to provide intrastate service in 30 states.

3. NTS, formed in 1985, is a privately held Rockville, Maryland corporation that provides resold international message telephone service (IMTS) under the streamlined regulatory requirements established for non-dominant international carriers in *International Competitive Policies*.[3] NTS also offers nationwide domestic interstate long-distance telecommunications services, including operator assisted services, by reselling the domestic long distance services of other common carriers. The provision of domestic long distance service is in accordance with the Commission's *Competitive Carrier* policies, according to the parties. The parties state that NTS' traffic originates in 49 states, Washington, D.C. and Puerto Rico and that NTS provides intrastate service in 36 states by certification, registration, tariff requirement or on an unregulated basis.

4. TCI and NTS state they have entered into an arrangement under which TCI will acquire NTS by purchasing all or a majority of the outstanding shares of Class A and Class B common stock of NTS from the current owners. These owners include Ronald J. Haan, who currently owns approximately 85 percent of NTS. In exchange for the NTS stock, TCI will: 1) pay the selling NTS shareholders cash in the amount of $20 million; 2) issue to the sellers three million shares in the aggregate of TCI stock; and 3) deliver to the selling NTS shareholders a note, payable in 24 monthly installments, in the amount equal to the difference between $28 million and the fair market value of TCI's shares. According to the parties, NTS will be owned by TCI after the completion of the stock purchase. The parties intend to interconnect and combine their operations as soon as practicable after closing the transaction. However, they indicated that until NTS subscribers are converted to TNI service, NTS will continue to purchase and resell the switched IMTS provided by other authorized carriers on the basis determined by the applicable rates, terms and conditions reflected in NTS' IMTS tariff currently on file with the Commission.

5. The applicants state that the proposed transaction will create substantial network and operational efficiencies which will result in reduced rates and increased profitability over time. Moreover, the applicants state that the transaction will result in a "full service" company by combining NTS' specialized and state of the art operator services with the wide range of services (*i.e* "1+", direct dial, out-WATS, 800, enhanced services and operator-assisted services) provided by TCI's subsidiary, TNI.

6. We find that the acquisition will offer some benefits to NTS' and TCI's customers and will not entail substantial changes in service by NTS or TCI. The merger and restructuring will permit TCI to compete more effectively in the international switched voice service marketplace.

7. We must also address the issue of whether this transaction will inhibit competition and thereby be detrimental to the public interest. Section 7 of the Clayton Act proscribes the acquisition of stock, other share capital, or assets of a company by another company "where in any line of commerce in any section of the country" the effect of such acquisition may be "substantially to lessen competition, or to tend to create a monopoly."[4] Under Section 11 of that statute, the Commission is empowered to enforce Section 7 in the case of "common carriers engage in wire or radio communications or radio transmissions of energy."[5] The courts have construed this to mean the requirements of Section 11 of the Clayton Act and the applicable provisions of the Communications Act of 1934, as amended, "are satisfied when the Commission seriously considers the antitrust consequences of a proposal and weighs those consequences with other public interest factors."[6] In brief, we are required to consider anti-competitive consequences as one factor in our public interest consideration. In the present instance, both NTS and TCI are non-dominant carriers and this proposed transaction does not appear to adversely impact the marketplace.

8. In view of the foregoing, we conclude that TCI's acquisition of the Section 214 authorization held by NTS to provide international switched voice resale services will

serve the public interest.[7] This acquisition will increase both the service area and the underlying service that TCI may resell.

9. Accordingly, IT IS ORDERED that the application of National Telephone Services, Inc and Telesphere Communications, Inc., File No. I-T-C-90-107-TC, IS GRANTED and TCI is authorized to acquire the Section 214 authorization in File No. I-T-C-88-138 from NTS.

10. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of execution.

11. IT IS FURTHER ORDERED that TCI shall file a tariff pursuant to Section 203 of the Communications Act of 1934, as amended, 47 U.S.C. Section 203 and Part 61 of the Commissions Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

12. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F. R. Section 43.61 (October 1, 1988)

13. IT IS FURTHER ORDERED that TCI is limited, under this order, to the provision of international switched voice services by the resale of the international switched voice services set forth in MCI Telecommunications Corp.'s Tariff F.C.C. No. 1 between the U.S. and those points listed in aforementioned tariff in accordance with NTS' previous authorization in File No. I-T-C-88-138.

14. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

FOOTNOTES

[1] Telesphere Network, Inc., 3 FCC Rcd 2728 (1988).

[2] Competitive Carrier, Second Report and Order, 91 FCC 2d 59 (1982) (*Competitive Carrier*).

[3] 102 FCC 2d 812 (1985), *recon. denied* 60 RR 1435 (1986).

[4] 15 U.S.C. Section 18.

[5] 15 U.S.C. Section 21.

[6] *United States v. FCC*, 652 F.2d 77, 88 (D.C. Cir. 1980).

[7] NTS was orized to resell the international switched voice services set forth in MCI Telecommunications Corp.'s Tarrif F.C.C. No. 1. *See* National Telephone Services, Inc. 3 FCC Rcd 4781 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 7, 1990

COMMISSION SEEKS COMMENT ON STRATEGIC PRICING REFUND PLANS AND RELATED ISSUES (CC DOCKET NO. 85-166, PHASE II, PART 1)

Pleading Cycle Established

On January 19, 1990 the Commission required specified local exchange carriers (LECs) to refund excessive special access charges and to submit reports describing in detail their plans for implementing the refund obligations determined by that Order. *Investigation of Special Access Tariffs of Local Exchange Carriers*, CC Docket No. 85-166, 5 FCC Rcd 412 (1989) (*Implementation Order*). The LECs submitted their reports on March 5 (BellSouth on February 28), 1990, and, in response to a Commission Order released April 2, 1990, certain LECs filed supplemental reports on April 10 (BellSouth on April 5), 1990.

In addition, by letter of May 22, 1990, the Deputy Chief (Policy), Common Carrier Bureau, requested the LECs to provide additional information regarding any settlement agreements between the LECs and their customers which may affect the amounts to be refunded. The requirements of that letter were clarified by a Public Notice issued June 15, 1990 (DA 90-840). The information submissions supplied in response to the May 22 letter request are on file at the Commission. Information for which proprietary treatment has not been requested has been included in the record of CC Docket No. 85-166, Phase II, Part 1, and is available for inspection at the Commission.

To assist our evaluation of the LECs' refund plans and the additional information submitted in response to the Bureau's information request, we invite interested parties to file comments on these submissions.

We are establishing the following pleading schedule for filing comments. Interested persons other than the filing LECs shall file comments on the LECs' refund plans and responses to the Bureau's letter no later than August 22, 1990. The LECs may file reply comments no later than August 29, 1990.

All pleadings must be captioned with the title of this proceeding and the docket number, and the notation "Comments on Refund Plans and Information Submission." Reply comments should similarly reference the title and docket number, and include the notation "Reply to Comments on Refund Plans and Information Submission."

Filing parties must file an original and five copies of all comments and reply comments in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. §1.51(c). In addition, commenters must submit one copy of their comments and reply comments to International Transcription Service, Inc. (ITS), at its office in Room 246, 1919 M Street, N.W., Washington, D.C. 20554, and a copy to the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Mr. Stan Wiggins, at (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

New York
Telephone Company

Revisions to Tariff F.C.C. No. 41 — Transmittal No. 1041

Service Discount Plan

ORDER

Adopted: August 13, 1990; Released: August 14, 1990

By the Chief, Common Carrier Bureau:

1. By Transmittal No. 1041, New York Telephone Company (NYT) would apply its Service Discount Plan, the discounted rate structure it has instituted for its Digital Data and High Capacity DS1 and DS3 services, to its voice grade private line service and to the optional features and functions associated with Digital Data High Capacity services. NYT also would eliminate the requirement that only coterminous circuits of the same type may be grouped together for a particular discount plan. Metropolitan Fiber Systems Inc. (Metropolitan) and Teleport Communications Group (Teleport) filed petitions to reject or to suspend and investigate; NYT replied. The tariff is scheduled to become effective on August 15, 1990.

2. The petitioners allege generally that Transmittal 1041 lacks the necessary cost support data. Metropolitan contends that NYT incorrectly assumes that because NYT's existing discount plans have been allowed to take effect with respect to other services, they should be applicable to voice grade services as well. The problem with this assumption, according to Metropolitan, is that NYT fails to take into account the differences in the facilities that underlie High Capacity and Digital Data services and those that underlie voice grade services. Metropolitan further contends that NYT relies upon strategic considerations to support its filing rather than explaining its basis of ratemaking or the cross-elastic effects that the rate changes are expected to have on other services. Metropoliatan Petition at 2-4 *See also* Teleport Petition at 4-5. Metropolitan further alleges that NYT fails to provide cost justification for its proposal to remove the requirement that circuits must be coterminous in order to qualify for service discounts. Metropolitan Petition at 6. Finally, Teleport argues that NYT does not provide the same interconnection for optional optical fiber interface options and voice grade services to its competitors as it does for itself. Teleport Petition at 3-4.

3. In its reply, NYT asserts that the cost support data for this Transmittal was included in its 1990 Annual Access Tariff filing, which was filed in accordance with the Bureau Orders in CC Docket No. 90-320. NYT Reply at 5-7. In addition, NYT states that lifting the restrictions on coterminous circuits has minimal cost consequences because its Service Discount Plan is not one based on volume discounts. *Id.* at 6-7. Finally, NYT claims that the reasonableness of its proposed expansion of the Service Discount Plan is not related to the availability of new types of interconnection. *Id.* at 4-5.

4. The Common Carrier Bureau has reviewed the tariff revisions and the pleadings. We conclude that no compelling argument has been presented that the tariff revisions are patently unlawful so as to require rejection and that no question has been presented that warrants investigation at this time.

5. Accordingly, IT IS ORDERED that the petitions to reject or suspend and investigate New York Telephone Tariff F.C.C. No. 41, Transmittal No. 1041 filed by Metropolitan Fiber Systems, Inc., and Teleport Communications Group ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 90-357

In the Matter of

Amendment of the Commission's Rules
with regard to the Establishment
and Regulation of New Digital Audio
Radio Services

NOTICE OF INQUIRY

Adopted: August 1, 1990; Released: August 21, 1990

By the Commission: Commissioner Duggan issuing a statement.

1. By this action, the Commission commences an initial inquiry into the development and implementation of new digital audio radio services. The Commission seeks information that will assist it in developing technical standards and regulatory policies for the possible introduction of such new digital radio services.

BACKGROUND

2. Digital audio radio services encompass a wide range of technologies and techniques used to provide sound quality much higher than can now be provided by existing AM and FM broadcasting services. In general, it refers to the use of digital modulation techniques to provide "compact disk" quality audio; improved stereo separation, even in mobile environments; greater dynamic range; better signal-to-noise and interference performance; and, elimination or reduction of multipath and fading problems. A number of parties both in the United States and Europe are exploring the prospect for transmitting audio programming using digital modulation techniques.

3. The Commission has received three filings requesting authorization to provide digital audio broadcasting services.[1] First, on May 18, 1990, Satellite CD Radio, Inc. (Satellite CD Radio) filed a petition for rule making to allocate frequencies for a new CD-quality radio service.[2] According to Satellite CD radio, this new service would be provided in part by satellites and in part by terrestrial transmitters. For the satellite portion, it proposes to sell transponder capacity on a non-common carrier basis to both existing AM and FM broadcasters seeking "superstation" status and new entities desiring to provide nationwide radio programming to subscription customers. The terrestrial portion of the system would be made available to existing AM and FM broadcasters. Satellite CD Radio proposes a primary allocation for terrestrial operations in the 1460-1470 MHz band. In addition, it proposes a primary allocation for digital satellite radio service in the 1470-1530 MHz band. This band is presently used for aeronautical telemetry operations. Satellite CD Radio states that these two allocations would provide 34 channels of local radio service and 66 channels of satellite service.

4. Second, on May 22, 1990, Radio Satellite Corporation (RSC) filed an application to construct and operate an earth station that would provide digital audio programming along with other mobile services through the mobile satellite system licensed to the American Mobile Satellite Corporation. RSC proposes to resell satellite capacity on a non-common carrier basis to common carrier and broadcast entities who would provide the services.

5. Third, on July 27, 1990, Strother Communications, Inc. (SCI) filed a petition for rule making requesting the Commission to allocate spectrum and adopt rules for a terrestrial digital audio broadcasting system (DAB). In SCI's proposal, DAB channels would first be made available to existing AM and FM broadcasters. The remaining channels would be allocated using an application filing window, and, in the case of mutually exclusive applications, either lotteries or comparative hearings would determine the licensee. SCI proposes that a primary allocation of 48 MHz be made available for DAB in the 225-2700 MHz range, with the preferred allocation as close to 225 MHz as possible. SCI states that 48 MHz of spectrum would provide 192 DAB channels of 250 kHz each. [3]

6. In Europe, efforts are now underway to develop technical standards for digital radio. The European Broadcasting Union (EBU) and the European Eureka "Digital Audio Broadcasting" research and development project have been studying approaches to provide high quality sound service and have developed an advanced digital approach for both satellite and terrestrial sound broadcasting.[4]

DISCUSSION

7. Given these recent developments, and the variety of proposals for digital audio radio services presented to the Commission,[5] we believe that it is appropriate to begin a broad inquiry into all aspects of digital audio radio service. It is our intention in this proceeding to begin to focus public attention on this potentially important new medium so that the Commission will be in a position to act in an expeditious and reasoned manner to facilitate the emergence of digital radio as appropriate. The expediency of this proceeding assumes even greater importance, as we are in the process of formulating the United State's frequency allocation proposals for the 1992 World Administrative Radio Conference (1992 WARC).[6]

8. While digital radio service promises to offer significant quality and performance improvements, it also raises a number of important regulatory issues. One is the impact digital radio would have on existing audio services. A second issue, and perhaps the most difficult, is how to accommodate the spectrum needs of digital audio service. We also should consider the regulatory structure or structures needed to ensure that the public benefits of digital radio are most efficiently realized. Another issue, given the variety of frequencies proposed for use in the pending applications, is whether one set of governing policies should be adopted for the service regardless of the frequencies used or whether policies unique to each proposed band and service offering should be adopted. For example, should terrestrial digital audio radio service be

regulated as a broadcasting service, or a private service, while satellite digital audio radio is regulated as a common carrier?

9. *Potential for Improved Quality and Service*. Digital radio offers the potential for significant improvements in the sound quality of audio programming. We seek comment on the ramifications of these potential improvements on both broadcasters and the listening public. For example, has the wide consumer acceptance of compact disk players made the quality of existing AM and FM radio services less satisfactory to consumers? If it has, how has this dissatisfaction been manifested and is it likely to increase over time? To what extent would consumers be willing to pay extra for new equipment, capable of receiving digital audio broadcasts, for an incremental increase in sound quality? If some improvement in quality is desireable, should performance benchmarks be used to judge audio quality? Can these be quantified? To what extent should multipath and fading performance be a factor? Digital audio systems are now being developed for advanced television (ATV) systems.[7] To what extent could ATV be used for the provision of radio audio services? Conversely, would developments in digital radio be of value to ATV?

10. We also request information on other issues relating to implementation of digital radio broadcasting by providers of the service, such as cost and coverage area. What would be the service provider's cost to provide digital radio? We note that digital radio services can be provided by satellite and terrestrial based transmitters. A satellite-based system would appear to offer the benefits of wide-coverage area and would appear most conducive to providing regional or national digital audio services. Such a service could offer important public benefits of bringing new audio services to underserved areas and providing the availability of reliable, continuous service over major highway routes between distant cities. Terrestrial-based systems offer the advantage of local stations providing programming responsive to local needs. We request comment on the benefits of terrestrial-based and satellite-based digital radio systems, including hybrid systems combining both. Would it be desireable to authorize separate terrestrial and satellite services? What regulatory structure should be applied?

11. *Impact on Existing Radio Services*. The United States has a strong, competitive radio broadcast service. There are presently about 5000 AM radio stations and over 4300 commercial FM stations now providing service to listeners. Noncommercial public radio also plays an important role in providing service to the public through its 1400 stations. The addition of a new radio service might have a significant impact on these existing services. We request comment on whether a negative impact is likely and, if so, the magnitude of that impact, whether certain classes of stations might be disproportionately affected, and how any such affects could be minimized. Conversely, we ask whether converting to a more spectrum efficient, higher sound quality digital radio service might work to the eventual benefit of existing radio broadcasters? We also request comment on how we should permit existing satellite and terrestrial service providers to participate in the provision of new digital services. For example, should we provide existing terrestrial audio broadcasters with a migration or transition priority in a new digital audio service? Should there be a priority or "set aside" for noncommercial operations? With respect to other services, should satellite digital audio radio service be provided as part of the mobile satellite service (MSS), as RSC proposes, or should it be designated as a new satellite service?

12. *Accommodating Digital Audio*. While we wish to encourage technical innovation and the development of new services, such as digital audio, we must weigh these factors against competing demands for the use of the spectrum. We must judge the benefits of digital radio service against the needs of other existing and proposed new services. Accordingly, we seek comment on the amount of spectrum required for a digital radio service, potential frequency bands where such service(s) could be accommodated, and the impact that such digital radio allocation(s) may have on the availability of spectrum for other services. In this regard, we ask commenters particularly to address the issue of whether the existing UHF television allocation can, or should, be used to provide digital audio services in light of the need for this spectrum to accommodate ATV.[8] As previously noted, the proposal of RSC does not involve a frequency reallocation. We seek comment on the feasibility and desirability of permitting digital audio radio service in any bands generally allocated for the mobile satellite service. Also, we ask commenters to discuss how the development of this service might lead to future spectrum efficiencies.

13. If a new frequency allocation is provided for digital audio service, should provision be made for both satellite and terrestrial operations within the same band? Such an approach could expand the potential international market for digital audio receivers, since both terrestrial and satellite services would be able to use the same receivers. Should separate bands be reserved soley for terrestrial broadcasting and for satellite-based digital radio service? If so, how large should such allocations be? If digital audio is provided on a terrestrial basis, how many digital radio channels should be provided in various markets? If digital audio is provided by satellite, should several systems be accommodated? If enough spectrum to accommodate several system is not available, should a consortium approach, as suggested by Satellite CD Radio be adopted? Further, if provided by satellite, should the Commission's traditional open skies policy be applied to this new service? Such an approach would allow satellite licensees the flexibility to determine how the service would best be offered to their targeted markets. We also seek comment on the possibility of providing digital audio programming in the existing FM radio broadcasting allocation. We note that while it does not appear likely that existing AM radio channels could be converted to digital modulation, improvements in digital compression techniques make the possibility of providing digital audio signals within an existing 200 kHz FM radio band perhaps technically and economically feasible. We seek comment on the costs and benefits of such an approach to providing digital radio service. In our ATV proceedings, we noted the early work on satellite delivered ATV, but then choose to move agressively toward a terrestrial technology that would compliment our existing TV service without precluding satellite delivered ATV. Is this approach possible in the digital audio broadcasting area?

14. *Regulatory Issues*. We believe that it is appropriate to begin the process of inquiring into regulatory policies to ensure that a digital radio service, if permitted, will best serve the public interest. We request public comment on what regulatory stucture or structures should apply to

digital audio. The present proposals, for example, suggest providing digital radio services on both a non-broadcast subscription basis and on a more traditional broadcast service basis. Comment is requested on the merits of each of these approaches. We also request comment on whether traditional broadcast ownership restrictions should apply to providers of digital radio services. What ownership restrictions, if any, should apply to satellite delivered digital audio services given the fact that it is likely such services would be supplied on a regional or national basis? How can the provisions of Section 307(b) of the Communications Act regarding the distribution of facilities among states and communities, *e.g.*, localism, best be taken into account in the provision of digital audio services? What other existing broadcast rules and policies must be considered, and perhaps modified, in instituting satellite or terrestrial digital radio services? We also request comment on whether this service would be analogous to the situation in the domestic fixed-satellite industry, where fixed satellites are used to transmit "superstations" and other video programming on either a subscription or free-of-charge basis. If so. would similar regulation of digital radio service providers be appropriate.

15. We note that several proposals for digital radio suggest that several channels be made available at each transmitter location. For example, the Eureka system would permit 12 to 16 channels of programming on a 4 to 6 MHz channel. How should such a service be licensed and what regulatory structure should apply? Should each program provider be licensed or only the operator of the transmitting facility? What method should be used for selecting licensees to provide digital radio services? Further, how should we choose among competing systems?

16. *U.S. Competitiveness*. Digital sound broadcasting is now being actively investigated in many parts of the world. As indicated previously, this technology is being actively developed and tested in Europe. Canada and the Soviet Union are also actively investigating the possibility of implementing digital radio. To what extent would U.S. interest be disadvantaged if we do not participate in the development of this new technology? Is the development of digital audio radio simply one aspect of an overall move towards digitization of telecommunications? Would the encouragement of digital audio contribute to U.S. efforts to remain competitive in telecommunications and information processing?

PROCEDURAL MATTERS

17. This Notice of Inquiry is issued pursuant to authority contained in Sections 4(i), 303 and 403 of Communications Act of 1934, as amended. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 CFR Sections 1.415 and 1.419, interest parties may file comments on or before **October 12, 1990** and reply comments on or before **November 13, 1990.** All relevant and timely comments will be considered by the Commission before taking further action in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting documents. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to the Office of the the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street N.W., Washington, D.C. 20554. For further information concerning this Notice of Inquiry, contact Bruce A. Franca, Office of Engineering and Technology, Federal Communications Commission, Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Additionally, in the *Notice of Inquiry* in GEN Docket No. 89-554, addressing preparation for the 1992 World Administrative Radio Conference, the Commission requested comment on the need for a satellite sound broadcasting allocation in the United States. More specifically, that *Notice of Inquiry* requested comment on the need for a satellite sound broadcasting service in the 500-3000 MHz range and whether the service should have an exclusive allocation. 4 FCC Rcd 8546 (1989). In comments, The Voice of America, National Public Radio, and Adventist Broadcasting Service expressed support for an exclusive allocation for such a service.

[2] *See* Petition for Rule Making filed by Satellite CD Radio, Inc. (RM-7400). This petition was placed on public notice and comments were requested on its merits. The due dates for comments and replies to Satellite CD Radio's petition have been extended and are now August 20, 1990 and September 4, 1990, respectively. To the extent they are relevant, comments filed in response to Satellite CD Radio's petiton will also be considered in this proceeding.

[3] Prior to filing its Petition for Rule Making, on May 23, 1990, SCI filed an application for experimental authority to construct and operate a digital audio transmission system in Boston, Massachusetts and Washington, D.C. SCI has proposed the use of channel 14 or 59 in the Washington area and channel 59 in the Boston area to provide 14 digital audio program channels on each UHF television channel using the European developed Eureka-147 digital audio broadcast system.

[4] *See e.g., EBU/DAB Studies for a New Digital Sound Radio Broadcasting System - CD Quality for Mobiles* by C. Dosh, F. Kozamernik, E. Meier-Engelen, D. Pommier, P.A. Ratliff.

[5] In addition, we note that three companies, International Cablecasting, Technologies Inc., General Instrument Inc., and Digital Radio Labs, Inc. have already begun to offer cable digital radio services. In these systems, program material is delivered to consumers in digital format on a cable system's unused trunk space. The digital information is then converted to analog format by a component that connects to the consumer's audio system. From thirty to ninety-six CD quality digital channels will be available, depending on which of the three systems is in use. Currently, non-CD quality cable music services reach approximately 11 million subscribers.

[6] In the Commission's upcoming Second Notice of Inquiry relating to preparation for the 1992 WARC, frequency allocations for digital audio broadcasting, by satellite and terrestrial means, are being considered as part of the United States's proposals to the conference.

[7] The Commission is considering the matter of authorization of advanced television service in another proceeding. *See Notice of Inquiry* in MM Docket No. 87-268, 2 FCC Rcd 5125 (1987); and, *Tentative Decision and Further Notice of Inquiry* in MM Docket No. 97-268, 3 FCC Rcd 6520 (1988); *Public Notice*, adopted March 21, 1990, FCC 90-101.

[8] *See*, "Interim Report: Estimate of Availability of Spectrum for Advanced Television (ATV) in the Existing Terrestrial Broadcast Bands," FCC/OET TM88-1 (August 1988); "Analyses of UHF TV Receiver Interference Immunities Considering Advanced Television," FCC/OET TM88-2 (August 1988); and, "Interim Report: Further Studies on the Availability of Spectrum for Advanced Television," FCC/OET TM89-1 (December 1989).

STATEMENT
of
COMMISSIONER ERVIN S. DUGGAN

In Re: Amendment of the Commission's Rules with regard to Establishing and Regulating New Digital Audio Radio Services

This item underscores a perennial question for the Commission and for incumbent industries -- will we embrace new technologies, or reject and discourage them? I am intrigued by digital audio radio. In my judgment, it holds great promise to improve radio broadcasting dramatically in this country. Indeed, I have personally heard the substantial difference in sound quality that it can deliver. And beyond such performance benefits, there are other real benefits in terms of spectrum efficiency and substantially reduced interference. Moreover, this technology raises important international competitiveness issues given the digital audio testing and development efforts already underway in Europe, Canada, and even the Soviet Union.

Of course, we can't afford to overlook the effects on existing broadcasters and our traditional concerns about localism. Without taking any position on the three applications pending before the Commission, however, it seems to me appropriate to reserve a certain amount of any digital audio spectrum for existing broadcasters -- in order to preserve our system of local broadcasting. In my judgment, however, there may be major public interest benefits in developing a national or regional satellite radio system through this technology.

I understand that the broadcast industry is actively studying this new technology, but has grave concerns about digital audio radio. Such fears are natural. But I hope that broadcasters will choose to embrace this new technology, not resist it. Consumers are becoming accustomed to better sound quality as compact disks pervade the market; cable radio is coming onto the scene to offer listeners a higher level of performance in their homes and offices. Therefore, embracing digital audio technology may be essential for radio broadcasters if they hope to compete in a new and changing world.

Wise entrepreneurs are those who, instead of playing King Canute, recognize the inevitability of new ways, new systems, new technologies, and plant their flags upon new territory. Wise entrepreneurs are those who are ruled by hope, not fear. As far as I can judge, the only technology that has ever been successfully contained and held back from widespread use is the hydrogen bomb. It will be a far better strategy, I believe, for broadcasters to rely on their strengths -- particularly their strong history of local and community service -- and look for opportunities and alliances with new delivery technologies, rather than resist the new so rigidly that they become paralyzed.

It is my hope that the FCC will not become so absorbed with the procedural issues involved in this Rule Making that we delay intelligent progress on this important new technology. The Commission has taken some of the blame, rightly or wrongly, for delays in introducing AM stereo and cellular radio. I hope we can avoid charges, in future years, that concerning this new service, the expert agency was asleep at the switch.

This is a timely, important action by the Commission. We need to be ready to react quickly on this issue and begin the necessary evaluation of the issues surrounding digital audio service in the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH

Comparably Efficient Interconnection
Plan for Transaction Services

ORDER

Adopted: August 15, 1990; Released: August 15, 1990

By the Chief, Common Carrier Bureau:

1. On August 10, 1990, the California Bankers Clearing House Association, the New York Clearing House Association, MasterCard International, Inc., and VISA U.S.A., Inc. (Joint Parties) filed a Motion for Extension of Time, requesting a two-week extension of time to file comments and a comparable extension of time to file reply comments in this proceeding.[1] The Joint Parties state that they require additional time to assess the implications of AT&T's amendment to its Comparably Efficient Interconnection (CEI) plan for the provision of transaction services, and to prepare comments and replies. The Joint Parties state that they were principal parties to the Commission's initial proceeding regarding AT&T's Transaction services,[2] and have interests in this proceeding as well. The Joint Parties also state that they did not receive a service copy of AT&T's amendment, and therefore were unaware of the proposed amendment until issuance of the public notice on July 24, 1990.

2. While we do not routinely grant extensions of time, we believe that in this case, there is good cause for a limited extension. [3] To further the public interest through the development of a complete record in this proceeding, we grant an extension of time for one week for parties to file comments and replies in this proceeding.[4]

3. Accordingly, IT IS ORDERED, that the motion for extension of time IS GRANTED to the extent described herein and otherwise DENIED. Parties ARE TO FILE comments by **August 17, 1990,** and reply comments by **August 27, 1990** .[5]

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Motion for Extension of Time, filed by the California Bankers Clearing House Association, the New York Clearing House Association, MasterCard International, Inc., and VISA U.S.A., Inc. on August 10, 1990. We established August 10, 1990 as the filing date for comments and August 20, 1990 for replies in FCC Public Notice, DA 90-984, "Pleading Cycle Established for Comments on Amendment to AT&T's Comparably Efficient Interconnection Plan for Transaction Services," released July 30, 1990.

[2] *AT&T Plan for the Provision of Transaction Services*, 3 FCC Rcd 2702 (1988), *applications for review denied*, 4 FCC Rcd 4544 (1989).

[3] Section 1.46(a) of the Commission's Rules, 47 C.F.R. §1.46(a).

[4] We note that while the service list attached to AT&T's amendment to its CEI plan for transaction services states that a copy was sent to the counsel for the Joint Parties, AT&T was not required to serve these parties.

[5] This action is taken pursuant to Sections 4(j) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(j) and 155(c), and authority delegated thereunder pursuant to Sections 0.91 and 0.291 of the Communication's Rules, 47 C.F.R. §§ 0.91 and 0.291.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-368

In the Matter of

Computer III Remand Proceedings

NOTICE OF PROPOSED RULE MAKING

Adopted: August 3, 1990; Released: August 6, 1990

By the Commission:

1. On June 6, 1990, the United States Court of Appeals for the Ninth Circuit in *California* v. *FCC* [1] vacated and remanded three Commission decisions in the *Computer III* proceeding.[2] We initiate this Rule Making proceeding to consider the issues raised by the Court's decision. In this Notice, we propose: (1) to reinstate Open Network Architecture (ONA) obligations on the Bell Operating Companies (BOCs) and the American Telephone and Telegraph Company (AT&T); [3] (2) to permit AT&T to provide collocated enhanced services on an integrated basis pursuant to the nonstructural safeguards adopted in *Computer III*; and (3) to reinstate certain *Computer III* decisions regarding Network Channel Terminating Equipment (NCTE).[4] We do not here raise the issue of the regulatory safeguards necessary to permit the BOCs to provide enhanced services. That issue will be the subject of a separate Notice of Proposed Rule Making.

I. BACKGROUND

2. Under the *Computer II* regime, AT&T and the BOCs generally were required to offer any enhanced services through structurally separate subsidiaries.[5] In the *Computer III* proceeding,[6] the Commission permitted AT&T and the BOCs to offer enhanced services integrated with their basic service offerings, provided that those carriers comply with several nonstructural safeguards designed to protect against possible anticompetitive conduct against competing enhanced service providers (ESPs). The Commission required, for instance, that the BOCs implement ONA in their provision of basic services, thus ensuring comparably efficient access by ESPs to the local exchange network. The Commission required the BOCs, under ONA, to unbundle basic services useful to ESPs.[7] Before ONA was implemented, the Commission permitted the BOCs to offer specific enhanced services on an integrated basis upon Commission approval of service-specific Comparably Efficient Interconnection (CEI) plans, which are designed to provide competitors with comparably efficient interconnection pending final implementation of ONA. The Commission required AT&T to implement a modified form of ONA in light of the greater competition existing in the provision of interstate interexchange basic services. Under ONA, AT&T is not required to further unbundle its basic services, but is required to file, and obtain approval for, service-specific CEI plans before offering enhanced services integrated or collocated with its basic service facilities.[8]

3. The *Computer III* decisions also addressed the regulation of protocol processing, Voice Messaging Service (VMS), and NCTE, among other things. The Commission retained the *Computer II* classification of protocol processing as an enhanced service, established specific CEI/ONA requirements for protocol processing based on the general principles of the *Phase I Order*, and issued some minor clarifications of the treatment of protocol processing.[9] The Commission concluded that VMS should continue to be classified as an enhanced service. With respect to NCTE, the Commission reaffirmed its status as Customer Premises Equipment (CPE).[10] The Commission further concluded that, subject to certain conditions, carriers should be permitted to provide on a regulated basis remote loopback testing, an NCTE function, using equipment on the customer premises on the network side of the demarcation point. The Commission also limited the "multiplexer exception"[11] to the provision of existing equipment provided under that exception, and of updated or improved versions of such equipment.[12] Finally, the Commission decided to entertain on a case-by-case basis requests for waivers to permit the offering by carriers of other NCTE functions (including multiplexing not covered by the multiplexer exception) on a regulated basis.[13]

4. On review, the *California* Court found certain Commission decisions in *Computer III* to be arbitrary and capricious. Specifically, the Court held that the Commission had not adequately justified the decision to replace structural separation with nonstructural safeguards for BOC enhanced service operations.[14] The Court also held that certain Commission preemption decisions had not been adequately justified. The Court decided to vacate the *Computer III* orders and remand the case to the Commission for further proceedings consistent with the Court's opinion.[15]

II. DISCUSSION

5. The vacation of the *Computer III* orders generally returns the industry and the Commission to a *Computer II* regime.[16] We begin the process here of considering new permanent rules by addressing certain *Computer III* decisions that were not challenged in the briefs before the Court, decisions that were at most only tangentially mentioned in the Court opinion. In doing so, we incorporate the records from CC Docket Nos. 85-229 and 88-2 to the extent relevant to the issues raised by this Notice.

6. We do not revisit all *Computer III* decisions in this Notice. Most importantly, we do not reexamine BOC provision of enhanced services pursuant to nonstructural safeguards rather than structural separation. We will issue in the near future a separate Notice of Proposed Rule Making to consider that issue, which was the focus of the *California* opinion.

7. We also do not reopen the question of the regulatory status of VMS and NCTE. The *Computer III* orders retained the existing classifications of VMS as an enhanced service and NCTE as CPE, and we see no need to visit those issues in this Notice. Nor do we propose to address again the classification of protocol processing as an enhanced service.[17] Similarly, we do not address the cost allocation rules that separate the costs of unregulated services from the costs of regulated services, which were

developed in a proceeding totally separate from *Computer III*, and were affirmed on appeal.[18] Those rules are unaffected by the Court's decision in *California v. FCC*.

8. We tentatively conclude that we should require the BOCs to implement ONA independently of whether we ultimately conclude that we should permit the BOCs to provide enhanced services on an integrated basis. The availability of unbundled basic service functionalities used in the provision of enhanced services, as required by ONA, should facilitate the efficient provision and widespread availability of enhanced services and promote competition. Additionally, as the Court noted, ONA will make any provision of inferior access to BOC enhanced service competitors more readily detectable and therefore will reduce the potential for discrimination between the BOCs' enhanced service operations and those of other ESPs.[19] The Commission has developed ONA in a meticulous fashion over the past five years based on a substantial record. It would not be in the public interest to delay significantly the benefits of ONA to the American consumer.[20]

9. We believe this tentative conclusion is consistent with the Court's decision and with Commission decisions in the *Computer III* proceeding. The Court's reasoning focused on the perceived cross-subsidization potential associated with BOC provision of enhanced services on an integrated basis with their basic services, not on whether the implementation of ONA irrespective of what other safeguards exist would serve the public interest. On its part, *Computer III* did not preclude the BOCs or AT&T from using separate corporate entities for the provision of enhanced services. Indeed, *Computer III* emphasized that a decision to retain separate subsidiaries would not exempt those carriers from the requirement for filing and implementing ONA plans.[21] In light of this, we propose to reinstitute the Commission's prior decisions concerning ONA in *Computer III* and the *ONA Proceeding*,[22] and ask interested parties to comment on this proposal.

10. We also propose to permit AT&T to provide enhanced services on an integrated basis subject to nonstructural safeguards as those were set forth in *Computer III*.[23] We believe that the continued regulation of AT&T's provision of enhanced services by nonstructural safeguards enhances the public interest and is consistent with the Court's opinion. The Commission's decision permitting AT&T to provide enhanced services pursuant to nonstructural safeguards was not appealed or briefed, and the Court opinion did not question the adequacy of any nonstructural safeguards as applied to AT&T. AT&T faces significantly greater competition than the BOCs in the provision of basic services. This competition reduces AT&T's ability to price basic services above cost in order to subsidize enhanced service offerings. The application of "price cap" regulation to AT&T also reduces any incentives for cross-subsidization of unregulated service offerings.[24] We thus believe that continuing to permit AT&T to provide enhanced services pursuant to nonstructural safeguards is consistent with the Court's opinion and the public interest. Accordingly, we propose to reinstate our prior decisions concerning the provision of enhanced services by AT&T pursuant to nonstructural safeguards, and request comments on this proposal.[25]

11. The *Phase II Order* also concluded that, subject to certain conditions, carriers should be permitted to provide remote loopback testing on a regulated basis through equipment located on the customer premises on the network side of the demarcation point in order to achieve certain technical and efficiency benefits. The *Phase II Order* also limited the existing multiplexer exception and established a waiver standard for permitting carriers to offer NCTE functions on a regulated basis. None of these decisions was challenged before the *California* Court, or was implicated in the *Computer III* deficiencies found by the Court. We tentatively conclude that we should reaffirm these decisions, and seek comment on this proposal.

12. On July 23, 1990, the Common Carrier Bureau issued a waiver of *Computer II* for AT&T's provision of enhanced services on an integrated basis,[26] the provision by carriers of remote loopback testing on a regulated basis under the terms and conditions specified in *Computer III*, and application of the *Computer III* changes to the multiplexer exception and the NCTE waiver standard until this Commission issued an anticipated Notice of Proposed Rule Making. The Bureau's action was premised on a desire to avoid significant disruptions in service provisioning until the Commission instituted an anticipated Rule Making proceeding on remand. In light of our proposal to reinstitute these earlier decisions, and incorporating the reasoning of the Bureau's order, we conclude that the public interest would be served by extending this waiver until the conclusion of this proceeding.[27]

III. REGULATORY FLEXIBILITY ACT ANALYSIS

13. We certify that the Regulatory Flexibility Act[28] is not applicable to the rule changes we are proposing in this proceeding. In accordance with the provisions of Section 605 of that Act, a copy of this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration at the time of publication of a summary of this Notice in the Federal Register.

IV. PAPERWORK REDUCTION ACT ANALYSIS

14. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or recordkeeping, labeling, disclosure, or record retention requirements, and will not increase or decrease burden hours imposed on the public.

V. EX PARTE REQUIREMENTS

15. For purposes of this non-restricted notice and comment Rule Making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a) of the Commission's Rules, 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission: (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f) of the Commission's Rules, 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction

of evidence or the resolution of issues in the proceeding. Section 1.1203 of the Commission's Rules, 47 C.F.R. § 1.1203.

16. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b) of the Commission's Rules, 47 C.F.R. § 1.1202(b). Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an ex parte presentation.

17. Any person who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. Section 1.1206 of the Commission's Rules, 47 C.F.R. § 1.1206.

18. All relevant and timely comments and reply comments will be considered by this Commission. In reaching our decision, this Commission may take into account information and ideas not contained in the comments, provided that such information or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of this Commission's reliance on such information is noted in the Order.

VI. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED that NOTICE IS HEREBY GIVEN of the proposed regulatory changes described above, and that COMMENT IS INVITED on these proposals.[29]

20. IT IS FURTHER ORDERED that pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 & 1.419, comments SHALL BE FILED with the Secretary, Federal Communications Commission, Washington, D.C. 20554 on or before **September 10, 1990,** and reply comments SHALL BE FILED with the Secretary on or before **September 20, 1990.** To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. In addition, parties should file one copy of any such pleadings with the Policy and Program Planning Division, Common Carrier Bureau, Room 544, 1919 M Street, N.W., Washington, D.C. Parties should also file one copy of any documents filed in this docket with this Commission's copy contractor, International Transcription Services, Inc., Suite 140, 2100 M Street, N.W., Washington, D.C. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room, Room 239, 1919 M Street, N.W., Washington, D.C. 20554.

21. IT IS FURTHER ORDERED, that a waiver of *Computer II* IS GRANTED to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] People of the State of California, No. 87-7230, slip op. (9th Cir. June 6, 1990).

[2] Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Report and Order, CC Docket No. 85-229, 104 FCC 2d 958 (1986) (*Phase I Order*), *recon.*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration*); 2 FCC Rcd 3072 (1987) (*Phase II Order*).

[3] For an overview of the ONA requirements applicable to AT&T and the BOCs, *see generally* Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, 4 FCC Rcd 1, 17-22 (1988).

[4] "Digital NCTE is a generic term for devices located on customers' premises that both provide an interface between transmission facilities and terminal equipment, and perform functions that support digital communications such as signal conditioning, remote loopback testing, multiplexing, and electrical surge protection." *Phase II Order*, 2 FCC Rcd at 3119 n. 494.

[5] *Amendment of Section 64. 702 of the Commission's Rules and Regulations* (*Computer II*), Final Decision, 77 FCC 2d 384 (1980), *modified on recon.*, 84 FCC 2d 50 (1981), *modified on further recon.*, 88 FCC 2d 512 (1981), *aff'd sub nom. Computer and Communications Industry Association v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[6] Amendment of Sections 64.702 of the Commission's Rules and Regulations, CC Docket No. 85-229, Phase I, Report and Order, 104 FCC 2d 958 (1986) (*Phase I Order*), *reconsideration*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration Order*), *further reconsideration*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration*), *second further reconsideration*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Reconsideration*), *Phase I Order* and *Phase I Reconsideration Order vacated sub nom.* California v. FCC, No. 87-7230 (9th Cir. filed June 6, 1990), *appeal pending sub nom.* Illinois Bell Telephone Co. v. FCC, No. 88-1364 (D.C. Cir. pet. for rev. filed May 16, 1988); *Phase II Order*, CC Docket No. 85-229, Phase II, 2 FCC Rcd 3072 (1987), *reconsideration*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration Order*), *further reconsideration*, 4 FCC Rcd 5927 (1989) (*Phase II Further Reconsideration*), *appeal pending sub nom.* California v. FCC, No. 88-7183 (9th Cir. pet. for rev. filed May 13, 1988).

[7] Phase I Order at para. 217.

[8] *Computer III Phase I Reconsideration* at ¶¶ 45-53. Before *Computer III*, AT&T was permitted to provide enhanced services using facilities not collocated with basic network facilities under the terms of the *AT & T Limited Waiver Order*, which

treated such enhanced service facilities as CPE for regulatory purposes and used essentially the same nonstructural safeguards as applied to AT&T's integrated provision of basic services and CPE. Petition of AT&T for Limited and Temporary Waiver of 47 CFR Section 64.702 Regarding Its Provision of Unregulated Services Externally to the AT&T-C Network, *Memorandum Opinion and Order*, Mimeo No. 1147 (Com. Car. Bur. released November 27, 1985), *appl. for rev. denied*, 104 FCC 2d at 1043 n. 220. In *Computer III*, the Commission replaced those nonstructural safeguards with those adopted in *Computer III*. *See Computer III Phase I Reconsideration* at ¶ 53.

[9] *Phase II Order* at paras. 12-71; *Phase II Reconsideration Order* at paras.11-57.

[10] The BOCs were authorized to provide NCTE pursuant to nonstructural safeguards in the *BOC CPE Structural Relief Order*. Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies, CC Docket No. 86-79, 2 FCC Rcd 143, *modified on recon.*, 3 FCC Rcd 22 (1987), *aff'd sub nom.* Illinois Bell Telephone Co. v. FCC, 883 F.2d 104 (198-).

[11] The multiplexer exception

> permits carrier provision of multiplexers on customer premises as part of a regulated service in order to facilitate provision of tariffed basic service offerings of (a) two or more communications channels to a single customer, or (b) individual channels to two or more customers.

Phase II Order at para. 235.

[12] *See Phase II Reconsideration* at para. 138.

[13] *Phase II Order*, 2 FCC Rcd at 3105-06.

[14] California v. FCC, slip op. at 5767.

[15] We believe that expeditious resolution of the issues discussed in this Notice is critical to remove any uncertainty about this Commission's continued commitment to implementing ONA after the *California* decision. Thus, we initiate this proceeding before the issuance of the mandate of the Ninth Circuit.

[16] The U.S. Court of Appeals for the District of Columbia Circuit has held that when an agency replaces an existing rule with a new rule, and a court vacates all or part of the new rule, the effect is to reinstate the rules previously in force. Action on Smoking and Health v. C.A.B., 713 F.2d 795, 797 (D.C. Cir. 1983).

[17] In the Phase II order, we revisited our earlier determination under the *Computer II* regime that protocol processing services were enhanced services and reaffirmed that classification. The People of California filed a separate petition for review of that aspect of the Phase II order in the Ninth Circuit, Docket No. 88-7183 (filed May 13, 1988), and the Court held that petition in abeyance pending resolution of the principal *Computer III* petitions.

The Ninth Circuit's decision in *Computer III*, by vacating both the Phase I and Phase II orders, appears to have eliminated those aspects of the Phase II order reaffirming the classification of protocol processing as an enhanced service and thus to have mooted California's petition in No. 88-7183. Commission litigation counsel have been instructed to file a suggestion of mootness in that case, thus seeking dismissal. Any party that disagrees with our interpretation of the effect of the vacation orders will have an opportunity to respond to the Commission's suggestion of mootness.

Because the classification of protocol processing in *Computer III* merely reaffirmed the Commission's earlier classification of those services, the effect of the vacation order is to restore protocol conversion services to their *Computer II* status, which also was enhanced. There is thus no need to propose further consideration of this classification issue in this notice.

[18] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, 2 FCC Rcd 1298, *recon.*, 2 FCC Rcd 6283 (1987), *further recon.*, 3 FCC Rcd 6701 (1988), *aff'd sub nom.* Southwestern Bell Telephone Corp. v. FCC, 896 F.2d 1378 (D.C.Cir. 1989).

[19] California v. FCC, slip op. at 5757.

[20] We have been working on ONA matters of mutual federal/state concern through the Section 410(b) Joint Conference. We look forward to working with the states through the Joint Conference on the continuing evolution of ONA.

[21] *Phase I Reconsideration Order* at 1139.

[22] Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2 Phase I, 4 FCC Rcd 1 (1988), *reconsideration*, 5 FCC Rcd 3084 (1990), *further order*, 5 FCC Rcd 3103 (1990) *appeals pending sub. nom.* California v. FCC, No. 90-70336 (9th Cir. filed July 5, 1990), and *sub. nom.* MCI v. FCC No. 90-1332 (D.C. Cir. filed July 5, 1990); CC Docket No. 88-2 Phase II, 4 FCC Rcd 2449 (1988).

[23] We include both enhanced services provided with facilities collocated with AT&T basic service facilities and enhanced services provided with noncollocated facilities.

[24] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 4 FCC Rcd 2873 (1989), *recon. pending*.

[25] We recognize that we have proposed in another proceeding to eliminate or modify certain of the *Computer III* requirements applied to AT&T. Competition in the Interstate Interexchange Marketplace, 5 FCC Rcd 2627 (1990). Our tentative conclusion here to reinstitute the *Computer III* structure for AT&T reflects only a determination that we should apply *Computer III*, rather than *Computer II*, requirements to AT&T's provision of enhanced services. It does not reflect any judgment about our existing proposals to modify the *Computer III* requirements applied to AT&T, which will be considered in the other proceeding.

[26] To the extent there may be any question regarding the scope of this waiver, we find that the waiver covers AT&T's integrated provision of enhanced services through both collocated and noncollocated facilities.

[27] A separate interim waiver granted by the Bureau with respect to continued BOC provision of services pursuant to approved CEI plans and market trials will remain in effect until the initiation of a new structural separation Notice of Proposed Rule Making, at which point the Commission will decide whether to extend that interim waiver as well.

[28] 5 U.S.C. § 601-612. AT&T and the BOCs are dominant carriers under the Commission's Rules and are not small entities as defined by the Act. The Commission has also concluded that small telephone companies are dominant in their fields of operation and therefore are not small entities as defined by the Regulatory Flexibility Act, thus the parties directly subject to the proposals, do not fall within the Act's definition of small entity. *Id.* § 601. *See* Third Report and Order, MTS and WATS Market Structure, 93 FCC 2d 241 at 338-39 (1983). Thus, this Commission is not required by the terms of that Act to apply the formal procedures set forth therein. We are nevertheless committed to reducing the regulatory burdens on small telephone companies whenever possible consistent with our other public interest responsibilities. Accordingly, we have chosen to utilize, on an informal basis, appropriate procedures to analyze the effect of proposed regulations on small companies. *See* Memorandum Opinion and Order, WATS-Related and Other

Amendments of Part 69, CC Docket No. 86-1 at para. 29, *summarized in* 52 F.R. 8258 (Mar. 17, 1987). The NCTE changes we propose in this Notice should not affect any small entity.

[29] This action is taken pursuant to Sections 1, 4(i), 4 (j), 201-205, 218, 220, 303(r) and 403 of the Communications Act as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 218, 220, 303(r) and 403.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

JACK H. TAYLOR, JR. FOIA Control No. 90-17

On Request for Inspection
of Records

MEMORANDUM OPINION AND ORDER

Adopted: August 13, 1990; Released: August 15, 1990

By the Commission:

1. The Commission has before it for consideration an Application for Review filed by Jack H. Taylor, Jr., seeking review of an initial ruling by the Mass Media Bureau (Bureau) entered on May 11, 1990, which denied, in part, Mr. Taylor's request for records under the Freedom of Information Act (FOIA). 5 U.S.C. § 552. In his initial request, Mr. Taylor, an employee of the *Dallas Times Herald* (*Dallas Times*), sought access to Commission records relating to the Bureau's denial of the Times Herald Printing Company's (Times Herald) request for an order to show cause against the A.H. Bello Corporation. *See* letter to Thomas J. Casey, Esquire from Roy J. Stewart, Chief, Mass Media Bureau, dated April 26, 1990.

2. The May 11 Bureau decision granted access to many of the documents requested but withheld certain documents and portions of others. The Bureau reasoned that the subject documents were exempt from mandatory disclosure under the deliberative process privilege embodied in FOIA Exemption 5. *See* 5 U.S.C. § 552(b)(5). The deliberative process privilege protects from mandatory disclosure inter-agency and intra-agency letters or memorandums the disclosure of which could compromise the Commission's decision making process. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). The Bureau further attached a detailed index to its decision identifying each document withheld, in whole or part, and furnished a specific explanation of its reasons for withholding the records in question.

3. On appeal, Mr. Taylor continues to seek disclosure of nine documents that the Bureau withheld under the deliberative process privilege. The documents consist of legal memoranda analyzing various issues raised by the Times Herald's petition and drafts of the Bureau's letter *Order*, which ultimately resulted in a denial of the petition.

4. In his Application for Review, the Requester contends that the contested documents became subject to mandatory disclosure when the Bureau adopted and released its final *Order* denying the *Times Herald*'s petition because no further action was contemplated in the matter. Further, Mr. Taylor asserts at length that any document discussing any rationale underlying the Bureau's *Order* should be construed to constitute a part of the final Bureau decision and, therefore, should be released. Finally, the Requester argues that there is sufficient public interest in the subject matter of the Bureau's *Order*, in both the general news media and the trade press, to warrant discretionary disclosure of the withheld documents.

5. We uphold the Bureau's decision that the instant documents are exempt from mandatory disclosure pursuant to the deliberative process privilege. None of the documents constitutes a decisional component of the "final order" adopted by the Commission. Rather, each document renders legal advice preliminary to a final agency decision or constitutes an earlier draft of the final order prepared for consideration and adoption by the Bureau Chief. The documents clearly qualify for protection under the deliberative process privilege since each preceded the Bureau's final decision and each contains opinions and recommendations leading up to that decision. *See Dudman Communications Corp. v. Department of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987). Moreover, none of the subject documents was cited or incorporated by reference into the final decision and, therefore, each continues to be protected from mandatory disclosure by Exemption 5. *See Sears, Roebuck & Co.*, 421 U.S. 132, 161. Finally, we are satisfied that the risk of dampening the frank and free exchange of views by the staff outweighs whatever public interest may be gained from discretionary release of the documents.

6. Accordingly, for the foregoing reasons, IT IS ORDERED, That the Application for Review filed by Jack H. Taylor, Jr. IS DENIED. The Requester may seek judicial review of this decision pursuant to 5 U.S.C. §552(a)(4)(B).

7. The officials responsible for this action are the following Commissioners: Alfred C. Sikes, Chairman, James H. Quello, Sherrie P. Marshall, Andrew C. Barrett and Ervin S. Duggan.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-365

In re Applications of

THRESHOLD COMMUNICATIONS (hereafter "Threshold")	File No. BPH-890501ME
GARRY E. AND K. DIANE THOMPSON (hereafter "Thompson")	File No. BPH-890501MI
CHESTER P. COLEMAN (hereafter "Coleman")	File No. BPH-890502MD
COPPEROPOLIS BROADCASTING COMPANY (hereafter "Copperopolis")	File No. BPH-890502ME

For Construction Permit
for a New FM Station on Channel 288A
in Copperopolis, California

HEARING DESIGNATION ORDER

Adopted: August 1, 1990; Released: August 22, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Copperopolis*. Raveesh K. Kumra (Kumra), partner of Copperopolis has indicated that he has an application pending for authority to establish a new cellular system to operate on Frequency Block A in the Domestic Public Cellular System to serve Market 340. California 5 - San Luis Obispo - Rural Service Area. On January 8, 1990, the Chief, Common Carrier Bureau released a *Hearing Designation Order*, CC Docket No. 89-610, in which certain issues, including a character qualifications issue, were added against Kumra. Accordingly, while Copperopolis will be allowed to proceed to comparative hearing, it shall be ordered that any construction permit awarded to it as a result of this proceeding shall be conditioned on the outcome of CC Docket No. 89-610.

3. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Coleman	May 21, 1990
Copperopolis	January 18, 1990; April 27, 1990 June 15, 1990

4. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That, in the event a construction permit is granted to Copperopolis in this proceeding, it shall be conditioned upon the outcome of CC Docket 89-610.

8. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Coleman and Copperopolis ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

9. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance

stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-364

In re Applications of

MBC Limited Partnership (hereafter MBC)	File No.BPH-890503MD
Deroblo Communication, Inc. (hereafter Deroblo)	File No.BPH-890503MJ
Rey-Cel Broadcasting Limited Partnership (hereafter Rey-Cel)	File No.BPH-890503MM

For Construction Permit
for a New FM Station on Channel 288A
in Hali' Imaile, Hawaii

HEARING DESIGNATION ORDER

Adopted: August 1, 1990; Released: August 22, 1990.

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. An informal objection filed by Mark Ferguson on May 15, 1990 claims that MBC has lost the use of its proposed transmitter site, and also that site is located within 25 feet of a native Hawaiian heiau site, thus necessitating the filing of an Environmental Assessment by MBC. MBC proposed to sidemount its antenna on a tower being constructed by licensees of station KLHI-FM. Ferguson supports his allegations with a letter from the Department of Land and Natural Resources of the State of Hawaii recommending the denial of an extension of a special use permit that had been awarded to licensees of station KLHI-FM. The recommendation was based on the existence of heiaus adjacent to the transmitter site. The State of Hawaii's recommendation that KLHI-FM's special use permit be denied does not constitute evidence that the site is actually unavailable. However, due to the fact that the transmitter site proposed by MBC appears to be located on or around a native Hawaiian heiau site, an environmental issue will be specified herein.

3. Section III of FCC Form 301 (October 1986) requires that an applicant certify that it has sufficient net liquid assets or that sufficient funds are available from committed sources to construct and operate the requested facility for three months without revenue. MBC did not make this certification on its application, but rather stated that it wold obtain financing and promptly amend its application. On April 24, 1990, MBC filed an untimely amendment certifying that it is now financially qualified. MBC's application was put on *Public Notice* of acceptance for tender on August 7, 1989; MBC, therefore, had until September 8, 1989 to file amendments as a matter of right. After the close of the amendment as of right period, an applicant cannot file a curative amendment to correct a grantability defect. *See Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19,936 (1985). To accept such amendments after the close of the amendment as of right period would be unfair to the other applicants in this proceeding, who fully complied with our financial certification requirements as of the amendment of right date. *See PrimeMedia Broadcasting, Inc.*, 3 FCC Rcd 4293 (1988); *see also Emmy Hahn Limited Partnership*, 4 FCC Rcd 8336 (1989); *Domega Broadcasting Corporation*, 4 FCC Rcd 1450 (1989). Accordingly, MBC's amendment is untimely and will herein be returned. Furthermore, an appropriate issue will be added as to MBC's financial qualifications.

4. Rey-Cel proposes to side-mount its antenna on a tower located adjacent to the tower for KVIB-FM. Our engineering study indicates that this proposal may significantly exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that Rey-Cel may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. §1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of RF radiation exceeding specific standards. Since Rey-Cel's proposal may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, it will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. This study must include the effects of FM station KVIB-FM. In this regard, if the site is presently fenced in compliance with the guidelines, Rey-Cel is required to so state and give the distance from the base of the tower to the fence. Accordingly, Rey-Cel will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

5. MBC proposes to sidemount its antenna on the tower proposed by station KLHI-FM, Lahaina, Hawaii, in application file no. BPH-890321ID, granted May 16, 1989. Our engineering study indicates that this proposal may significantly exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST

Bulletin No. 65 (October 1985). Additionally, it appears that the authorized site for KLHI-FM's tower is at, or adjacent to, a native Hawaiian heiau site. Construction at this location thus may have a significant effect on a piece of property that may be eligible for listing in the National Register of Historic Places. *See* Letter to *Kenneth S. Hayashi Corporation*, reference 8900-SB (Chief, Audio Services Division, May 30, 1990).[1] Consequently, we are concerned that MBC may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. §1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. Since MBC's proposal may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, it will be required to submit the environmental impact information described in 47 C.F.R. §1.1311. This study must include an RF assessment as well as the anticipated effect on the adjacent heiau site. If the site is presently fenced in compliance with the ANSI guidelines, MBC is required to so state and give the distance from the base of the tower to the fence. Accordingly, MBC will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp., recon. denied sub nom Old Pueblo Broadcasting Corp., supra.*

6. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. MBC has not completed Item 4 correctly. MBC's application gives a post office box number as the residence address for William Norris and W. Clinton Stennett. Accordingly, MBC must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

7. The applicants below have petitioned for leave to amend their application on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
MBC	April 24, 1990[2]
Deroblo	December 14, 1989

8. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and Deroblo have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Deroblo would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

9. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

10. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

11. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by the Deroblo would constitute a hazard to air navigation.

2. If a final environmental impact statement is issued with respect to Rey-Cel or MBC in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

3. To determine, with respect to MBC, whether the applicant is financially qualified.

4. To determine which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

12. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by MBC and Deroblo ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

13. IT IS FURTHER ORDERED, That MBC shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

14. IT IS FURTHER ORDERED, That the Informal Objection filed by Mark Ferguson IS GRANTED to the extent indicated herein, and IS DENIED in all other respects.

15. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

16. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel

of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

17. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

18. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] It also appears that construction of that tower has stopped pending resolution of this matter.

[2] The April 24 amendment will be accepted in part and returned in part. MBC will be allowed to amend its application with respect to its change in ownership; however, it will not be allowed to amend with respect to its financial qualifications (*see supra*).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-374

In re Application of

RAWLINS BROADCASTING CORP. File No. BRCT-880818KF

For Renewal of License of Station
KFNR(TV), Rawlins, Wyoming

and

FIRST NATIONAL BROADCASTING CORP. File No. BPCT-880901KF

For Construction Permit
Rawlins, Wyoming

HEARING DESIGNATION ORDER

Adopted: August 3, 1990; Released: August 22, 1990

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned application for the renewal of license of station KFNR(TV), channel 11, Rawlins, Wyoming, filed by Rawlins Broadcasting Corp., (Rawlins) and the mutually exclusive application of First National Broadcasting Corp. (First National) for a new commercial television station to operate on channel 11, Rawlins, Wyoming.

2. From our review of the First National's application, we cannot determine whether the applicant is in compliance with our environmental rules. Likewise, Rawlins has not submitted the required environmental filing. Under the rules, an applicant must determine whether the radiation from its antenna would have a significant environmental effect under the criteria set out in Section 1.1307 of the Commission's Rules. If the application is subject to enviromental processing under the Section 1.1307 criteria, the licensee must then submit an environmental assessment (EA) containing the information delineated in Section 1.1311 of the Commission Rules. Section 1.1307(b) states that an EA must be prepared if the station operation would cause exposure of workers or the general public to levels of radio frequency radiation exceeding specific standards. An examination of First National's application suggests that it has not followed the procedures outlined above. Rawlins, as required of renewal applicants, did not submit a RF radiation statement. The applicants will be required to file, within 30 days of the release of this Order, a statement or showing with respect to radiation hazards that might have adverse effect on the quality of the environment with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Television Branch, Mass Media Bureau, who will than proceed regarding this matter in accordance with the provision of Section 1.1308. A copy of the statement must also be filed with the Chief, Hearing Branch, Mass Media Bureau. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting*, 71 FCC 2d 229 (1979). *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

3. First National submitted a facsimile copy of page 23, Section VI and VII, FCC Form 301. Its responses to the questions of Equal Employment Opportunity and certification of public notice are not legible. First National will be required to submit an appropriate amendment to the presiding Administrative Law Judge within 30 days after this Order is released.

4. Except as indicated by the issues specified below, the applicants are qualified. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant would serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, better serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted.

6. IT IS FURTHER ORDERED, That First National Broadcasting Corp. and Rawlins Broadcast Corp. shall submit an amendment which contains an environmental statement as explained in paragraph 2, above, to the presiding Administrative Law Judge and a copy each to the Chief, Television Branch and the Chief, Hearing Branch, Mass Media Bureau, within 30 days after this Order is released.

7. IT IS FURTHER ORDERED, That First National Broadcasting Corp. shall submit a legible amendment for its response to page 23, Section VI and VII, FCC Form 301 to the presiding Administrative Law Judge within 30 days after this Order is released.

8. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applications herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order. Each applicant shall attach to its notice of appearance a remittance of $6,760 as a hearing fee as required by Section 1.1104 of the Commission's Rules.

9. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Barbara Kreisman, Chief
Video Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-375

In re Applications of

Fox Television Stations, Inc. — File No. BRCT-880801LW

For Renewal of License of Station KTTV(TV), Los Angeles, California

and

Rainbow Broadcasting, Inc. — File No. BPCT-881101KH

For Construction Permit Los Angeles, California

HEARING DESIGNATION ORDER

Adopted: July 31, 1990; Released: August 22, 1990

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it: (1) the above-captioned application for the renewal of license of station KTTV(TV), Channel 11, Los Angeles, California, filed by Fox Television Stations, Inc. (Fox); (2) the application of Rainbow Broadcasting, Inc. (Rainbow) for a new commercial television station on Channel 11, Los Angeles, California;[1] (3) a Consolidated Petition to Dismiss Rainbow's application, filed by Fox; (4) Petitions for Leave to Amend filed by Rainbow;[2] and (5) other related pleadings. [3]

2. On April 19, 1989, pursuant to the Commission's authorized random checks of the financial qualifications of applicants seeking to construct and operate new broadcast facilities,[4] Rainbow was requested to furnish details regarding its cost estimates to build a new television station, and to submit documentation showing the basis for its estimates. Rainbow was also requested to demonstrate its financial ability and, if it was relying on funds from financial institutions, to submit an appropriate loan commitment letter evidencing a present firm intention to lend a specified amount of money, together with all the terms of the loan, including collateral requirements.

3. On May 9, 1989, Rainbow responded to the request for documentation of its financial ability. As part of the responses, Rainbow submitted a letter from the Bank of America indicating a "willingness to consider" a loan up to $10 million, if and when Rainbow receives Commission approval to construct a new television station. The letter does not contain terms with respect to the duration of the loan, the rate of interest, required collateral, if any, or any other details evidencing a present firm intention to lend the necessary funds for construction. Accordingly, we will specify an appropriate issue against Rainbow.

4. Fernando Del Rio a stockholder of Rainbow, is presently employed as the Vice President, Public Affairs, at KCAL-TV, (formerly, KHJ-TV, Los Angeles, California) Norwalk, California. His current position could raise a cross-interest question. However, Mr. Del Rio has represented to the Commission that he will terminate all connection with KCAL-TV if Rainbow is the successful applicant. Accordingly, any grant of a construction permit to Rainbow will be conditioned upon Del Rio's severance of all connection with station KCAL-TV.

5. No determination has been reached that the tower height and location proposed by Rainbow would not constitute a hazard to air navigation. Accordingly, an issue regarding this matter will be specified.

6. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to the bank commitment letter of Bank of America to Rainbow Broadcasting.

   a. the terms and conditions with respect to rate of interest and collateral, if any, for the proposed loans;

   b. the duration and terms and conditions for repayment of the loan;

   c. whether, in light of the evidence adduced pursuant to a and b above, the bank letter establishes a present firm intent to lend the necessary funds for construction;

   d. whether, in light of all the evidence adduced above, the applicant is financially qualified.

2. To determine with respect to Rainbow Broadcasting, Inc., whether there is a reasonable possibility that the tower height and location proposed by it would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, better serve the public interest.

4. To determine in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

8. IT IS FURTHER ORDERED, That in the event of a grant of Rainbow Broadcasting, Inc.'s application, the construction permit shall be conditioned as follows:

> Prior to the commencement of operation of the television station authorized herein, permittee shall certify to the Commission that Fernando Del Rio has severed all connection with the licensee of Station KCAL-TV, Norwalk, California.

9. IT IS FURTHER ORDERED, That the Consolidated Petition to Dismiss Application filed by Fox Television, Inc. IS DISMISSED.

10. IT IS FURTHER ORDERED, That Rainbow Broadcasting, Inc.'s May 4, August 11, October 20, 1989, February 27 and May 1, 1990, Petitions for Leave to Amend ARE GRANTED and the accompanying amendments ARE ACCEPTED for Section 1.65 purposes only.

11. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 2.

12. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order. Each applicant shall attach to its notice of appearance a remittance of $6,760 as a hearing fee as required by Section 1.1104 of the Commission's Rules.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a) (2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Barbara Kreisman, Chief
Video Services Division
Mass Media Bureau

FOOTNOTES

[1] Citylight Communications, Inc. also filed an application to construct a new television station to operate on Channel 11 in Los Angeles. As the result of a settlement agreement reached between Citylight Communications, Inc. and Fox, the application was dismissed on November 24, 1989.

[2] Petitions for Leave to Amend were filed on May 4, August 11, October 20, 1989, February 27 and May 1, 1990. The amendments contained an updated report of transfer of stock between two non-voting shareholders, two voting shareholders formed an advertising agency and several changes in employment and residence addresses have been made by shareholders. This information is required by Section 1.65 of the Rules. The amendments will be accepted for 1.65 purposes only.

[3] The many petitions and responses filed herein are, in essence, predesignation petitions to specify issues. Since such are no longer permitted, they will be dismissed. *Processing of Contested Broadcasting Applications*, 72 FCC 2d 202 (1979). We note that these issues can be raised later before the presiding Administrative Law Judge as may be appropriate. In addition, we do not find a public interest justification to support Rainbow's request for the imposition of sanctions against Fox for filing the pleadings in question. There is sometimes a close line between a motion to dismiss and a predesignation motion for the specification of issues. Absent a clear case of abuse of process, we should not initiate a proceeding looking toward the imposition of sanctions, lest we discourage the filing of legitimate pleadings. *See, e.g., Radio Carrollton*, 72 F.C.C. 2d 264, 271 (1979) (high burden of pleading needed to support allegations of strike petitions). Rainbow's allegations do not meet that standard. First, Fox's pleadings are not, on their face, totally devoid of merit and thus, Fox's motives for submitting the pleading attacking Rainbow's financial qualifications must be examined in the context of Rainbow's application. Rainbow initially stated in its application that it was not financially qualified. Although Rainbow did subsequently submit the required certification, Rainbow was subject to a random check of its financial qualification and was required by the staff to furnish the actual documentation which provided the basis for its certification. Additionally, shortly after the staff letter to Rainbow requesting written documentation, the Commission released an Order adopting more stringent financial standards for new applicants challenging renewal applicants. Under these circumstances we are not persuaded that Fox's predesignation pleadings challenging Rainbow's financial qualifications, and seeking dismissal of its application, were filed solely to obstruct, impede or delay Rainbow's application. For the same reasons, we do not believe that Rainbow has established good cause for certifying to the Commission the question of sanctions against Fox for filing the pleadings discussed above.

[4] *Certification of Financial Qualifications by Applicants for Broadcast Station Construction Permits*, 2 FCC Rcd 2122 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 17, 1990

COMMENTS INVITED ON DEPRECIATION RATE PRESCRIPTIONS PROPOSED FOR DOMESTIC TELEPHONE CARRIERS AND ON COMMISSION POLICY FOR EFFECTIVE DATE OF DEPRECIATION PRESCRIPTIONS.

Comments are invited on proposed depreciation rates, amortizations and effective dates for thirteen domestic telephone carriers. The proposed rates for twelve of these carriers were developed in conjunction with the Commission's standard triennial depreciation rate review procedures, and, as such, reflect a thorough review of all depreciable telephone plant accounts. For the thirteenth carrier, United Inter-Mountain, only the rates for the three accounts affected by a recently completed fiber optic system were reviewed.

The rates under consideration are represented herein by the proposed expenses and composite rates shown in Attachment 1. Attachment 1 also lists the affected carriers and jurisdictions, the current expenses and composite rates (developed using the currently prescribed depreciation rates and amortizations) and the percentage change in expenses (proposed vs. current).

Each of these carriers submitted studies to the Commission in support of its proposed depreciation rates. The Commission's staff and the staffs of the state public utility commissions having jurisdiction over the carriers reviewed the carriers' submissions. The carriers' studies and the corresponding staff reviews were discussed by the three parties in correspondence, telephone conversations, and/or conferences. Each of the carriers thereafter formally filed updated studies which contained the data required by Section 43.43 of the Commission's rules. After considering all of this information, the staff recommends the life, salvage and curve shape parameters which underlie the rates shown on Attachment 1. The expenses shown on Attachment 1 are annual amounts estimated by the carriers and may not reflect actual expenses for 1990 because plant balances at the beginning of 1990 were used to estimate the expenses, and the rates and amortizations proposed may not be applicable for the entire year.

Attachment 2 lists the effective dates which the carriers proposed in their filings. In recent years, the Commission has adopted the effective dates proposed by the carriers, as long as they were between January 1 of the filing year and January 1 of the subsequent year. However, in the 1989 Depreciation Rate Prescription Order, 5 FCC Rcd 966, 968 (1990), the Commission stated that it may be time to reasses that policy, but it did not have a record before it to conduct such a reassessment. The Commission therefore directed the staff to make specific recommendations if a review is warranted. Accordingly, parties are invited to submit comments on whether the Commission should continue to adopt effective dates between January 1 of the filing year and January 1 of the subsequent year, or whether the Commission should adopt a uniform effective date of January 1 of the filing year (which is consistent with its policy prior to 1981).

Copies of the carriers' initial 1990 depreciation rate study submissions, the preliminary review of those submissions, the rate filings and other data supporting the proposed rates are available for public inspection in Suite 257, 2000 L Street N.W., Washington, DC. Copying facilities are available in Suite 812, 2000 L Street. Copies are also available from ITS, Suite 140, 2100 M Street, N.W., Washington, D.C.

Parties wishing to file comments on the depreciation rate proposals and the effective date issue summarized herein may do so by September 7, 1990. Replies may be filed by September 21, 1990. A copy of the comments and replies should be provided to the Chief, Depreciation Rates Branch.

For additional information contact Ms. Fatina Franklin, Chief, Depreciation Rates Branch, (202) 632-7500.

FEDERAL COMMUNICATIONS COMMISSION

ATTACHMENT 1

SUMMARY OF PROPOSED CHANGES IN ANNUAL DEPRECIATION EXPENSE BY JURISDICTION

Carrier - Jurisdiction	Investment	Annual Depreciation Expense and Composite Rate					
		Current		Proposed		Proposed Change	
		Expense	Rate	Expense	Rate	Expense	Percent
	($000)	($000)	(%)	($000)	(%)	($000)	(%)
ALASCOM	530,068	41,221	7.8	43,392	8.2	2,171	5.3
C&P OF VIRGINIA	4,080,535	290,168	7.1	309,704	7.6	19,536	6.7
C&P OF WEST VIRGINIA	1,313,129	104,416	8.0	112,795	8.6	8,379	8.0
CONTEL OF VIRGINIA	652,064	38,859	6.0	39,102	6.0	243	0.6
GTE NORTH							
Iowa	200,946	13,123	6.5	13,148	6.5	25	0.2
Nebraska	70,008	5,436	7.8	3,668	5.2	(1,768)	-32.5
Ohio	1,135,919	85,108	7.5	86,953	7.7	1,845	2.2
Wisconsin	746,208	47,529	6.4	45,602	6.1	(1,927)	-4.1
GTE SOUTH							
Alabama	245,768	18,195	7.4	19,111	7.8	916	5.0
Georgia	447,407	35,844	8.0	38,087	8.5	2,243	6.3
South Carolina	279,710	18,884	6.8	21,445	7.7	2,561	13.6
Tennessee	98,888	7,148	7.2	8,575	8.7	1,427	20.0
GTE SOUTHWEST							
Arkansas	149,361	9,223	6.2	10,230	6.8	1,007	10.9
New Mexico	85,590	6,056	7.1	6,142	7.2	86	1.4
Oklahoma	258,390	17,431	6.7	17,498	6.8	67	0.4
Texas	2,634,955	182,117	6.9	195,444	7.4	13,327	7.3
NEW ENGLAND TELEPHONE							
Maine	1,007,748	82,768	8.2	83,240	8.3	472	0.6
Massachusetts	5,758,079	423,062	7.3	431,623	7.5	8,561	2.0
New Hampshire	1,183,349	93,569	7.9	91,787	7.8	(1,782)	-1.9
Rhode Island	704,152	55,237	7.8	59,954	8.5	4,717	8.5
Vermont	576,947	46,062	8.0	49,688	8.6	3,626	7.9
OHIO BELL	4,733,287	341,709	7.2	351,077	7.4	9,368	2.7
PACIFIC NORTHWEST BELL							
Oregon	1,681,518	110,603	6.6	111,103	6.6	500	0.5
Washington	3,081,798	191,695	6.2	211,090	6.8	19,395	10.1
SOUTH CENTRAL BELL							
Alabama	3,079,846	232,961	7.6	242,599	7.9	9,638	4.1
Kentucky	1,776,083	123,611	7.0	131,695	7.4	8,084	6.5
Louisiana	3,480,723	277,511	8.0	277,124	8.0	(387)	-0.1
Mississippi	2,087,602	167,301	8.0	174,219	8.3	6,918	4.1
Tennessee	3,163,033	231,526	7.3	241,218	7.6	9,692	4.2
SOUTHERN NEW ENGLAND TELEPHONE							
Connecticut	3,301,310	235,255	7.1	249,684	7.6	14,429	6.1
UNITED INTER-MOUNTAIN							
West Virginia	202	0	0.0	12	5.9	12	0.0
COMPOSITE TOTAL	48,544,623	3,533,628	7.3	3,677,009	7.6	143,381	4.1

Attachment 2

SUMMARY OF PROPOSED EFFECTIVE DATES

Carrier-Jurisdiction	Effective Dates
ALASCOM, INC.	January 1, 1990
C&P OF VIRGINIA	January 1, 1990
C&P OF WEST VIRGINIA	January 1, 1990
CONTEL OF VIRGINIA	January 1, 1990
GTE NORTH	
Iowa	January 1, 1991
Nebraska	January 1, 1991
Ohio	January 1, 1991
Wisconsin	January 1, 1991
GTE SOUTH	
Alabama	July 1, 1990
Georgia	July 1, 1990
South Carolina	July 1, 1990
Tennessee	July 1, 1990
GTE SOUTHWEST	
Arkansas	July 1, 1990
New Mexico	July 1, 1990
Oklahoma	July 1, 1990
Texas	July 1, 1990
NEW ENGLAND TELEPHONE	
Maine	July 1, 1990
Massachusetts	July 1, 1990
New Hampshire	July 1, 1990
Rhode Island	July 1, 1990
Vermont	July 1, 1990
OHIO BELL	January 1, 1990
PACIFIC NORTHWEST BELL	
Oregon	January 1, 1990
Washington	January 1, 1990
SOUTH CENTRAL BELL	
Alabama	July 1, 1990
Kentucky	July 1, 1990
Louisiana	July 1, 1990
Mississippi	July 1, 1990
Tennessee	July 1, 1990
SOUTHERN NEW ENGLAND TELEPHONE	January 1, 1990
UNITED INTERMOUNTAIN	
West Virginia	January 1, 1990

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-28

In the Matter of

MEGA
BROADCASTING
CORP.

Licensee of Radio Station
WRPZ(AM)
Paris, Kentucky

Order to Show Cause Why the
License of Station WRPZ(AM),
Paris, Kentucky
Should Not Be Revoked

ORDER OF REVOCATION

Adopted: August 16, 1990; Released: August 22, 1990

1. This proceeding began on February 15, 1989, when the Commission released its *Order to Show Cause and Notice of Apparent Liability*, 4 FCC Rcd 1571 (1989) (*Order to Show Cause*). The Commission ordered Mega Broadcasting Corp. (hereinafter Mega or licensee) to show cause why its license for WRPZ(AM) should not be revoked.[1] The Commission specified an issue: "To determine whether Mega Broadcasting Corp. violated Sections 73.1740(a)(4) and/or 73.1750 of the Commission's Rules."[2] The Commission also specified an issue to determine in light of the evidence adduced whether Mega possesses the requisite qualifications to remain a Commission licensee.

2. This revocation is based upon the following uncontested facts. On November 20, 1987, the Commission received a complaint alleging that WRPZ(AM) had not broadcast programming since October 11, 1987. Investigation by Commission personnel from the Field Operations Bureau established that the station had ceased operation before November 1987. Monitoring by Field Operations staff during the week of May 23, 1988, indicated that the station remained non-operational. Subsequently, the Commission sent a letter of inquiry to the licensee at the address that appeared in Commission records. The letter, dated June 17, 1988, was returned stamped: "Returned to Sender. No Forwarding Order on File." It appears that the station has not resumed operation since at least November 1987. Furthermore, the licensee has neither requested Commission permission to remain off the air nor turned in its license, in violation of Sections 73.1740(a)(4) and 73.1750 of the Commission's Rules. Thus, on February 15, 1989, the Commission released its *Order to Show Cause*.

3. On March 24, 1989, the Commission's Mail Branch received an undated letter signed by John Bush. Commission records indicate that Bush owns 33 1/3% of the stock of Mega and is its secretary. The Bush letter states, *inter alia*, that Mega "does stand in violation of Section 73.1740(A)(4) (sic) in not notifying the FCC of being off the air" and that "we do not contest this charge." Bush then provides the following explanation:

> WRPZ had tremendous money problems do (sic) to being a daytime operation in a market with so many high power FMs and failure to gain market acceptance amoung (sic) the advertiser. This led to many creditors to threaten suit (sic), because of this the president of [Mega], John Crawford, turned off WRPZ without notice to any Mega officer. Two weeks later a letter was received stating this action and notifying Mega of Mr. Crawford's resignation from all duties and office of [Mega]. As a licensed FCC engineer, it was assumed that Mr. Crawford had also notified the FCC of this action.
>
> We had maintained a limmited (sic) broadcast schudle (sic) for a few months because of contract obligations. It was then found that Mr. Crawford had not notified the FCC of this action. At that point fear set in of fines and action of reprisalsfrom (sic) the FCC. Then vandelism (sic) to the transmitter prevented WRPZ from returning to the air.

Bush asks the Commission to allow Mega to sell the station and to "forgive all fines."

4. By *Memorandum Opinion and Order* released May 12, 1989 (FCC 89M-1423), Chief Administrative Law Judge Thomas B. Fitzpatrick ordered Mega to, *inter alia*, notify the Commission whether it intended to surrender its license for cancellation, waive its right to a hearing, elect to proceed to hearing, or assign the license, as permitted. By reply filed May 31, 1989, John Bush asserts that he is the sole spokesperson for Mega and that he proposed to solve "the current problem" by a sale of the station. If the sale was not accomplished by June 15, 1989, Bush stated, Mega would surrender its license for cancellation.

5. On June 8, 1989, the Mass Media Bureau asked Chief Judge Fitzpatrick to terminate the hearing and certify the case to the Commission for further action. Chief Judge Fitzpatrick agreed with the Bureau's conclusions that Mega has waived its right to a hearing, since it is clear from Bush's reply that the licensee has no intention of contesting the allegations in the *Order to Show Cause* or to proceed to hearing. Chief Judge Fitzpatrick noted that Mega did not respond to the Bureau's Motion to Certify, although return receipt indicates that it was received by John Bush on June 10, 1989. The failure to oppose the Bureau's motion is further evidence of Mega's intent to waive its right to a hearing.

6. Furthermore, Mega evidences no intention to return WRPZ to the air. Indeed, its only interest is in assigning the license. [3] Accordingly, by *Memorandum Opinion and Order* released June 28, 1989 (FCC 89M-1732), Chief Judge Fitzpatrick terminated the above-captioned proceeding and certified the case to the Commission.

7. The Commission, by the Chief, Mass Media Bureau, has considered the facts advanced by Mega in seeking to justify its admitted violation of Sections 73.1740 and 73.1750 of the Commission's Rules. *See* Section 1.92(b) of the Commission's Rules. We do not believe that those facts, which are set forth above, mitigate Mega's conduct.

Although Bush's explanation of WRPZ's silence lacks a chronological reference point, it is clear that he learned, at some point, that the Commission had, in fact, not been notified of the station's silent status. It is also apparent that, even then, because of fear of reprisals, Mega intentionally failed to provide the required notification. Of course, fear of reprisals does not excuse compliance with the Commission's Rules. Furthermore, it does not justify our taking any action short of revocation for what was eventually a willful violation of Sections 73.1740 and 73.1750 of the Commission's Rules.

8. With respect to Bush's stated intention to sell the station, we note that Commission precedent does not permit a licensee which has been designated for revocation hearing to assign the license. *See Jefferson Radio Co. v. FCC*, 340 F.2d 781 (D.C. Cir. 1964).

9. In view of the foregoing, it is concluded that Mega has violated the provisions of Sections 73.1740(a)(4) and 73.1750 of the Commission's Rules. Accordingly, the Commission ORDERS that the license of station WRPZ(AM), Paris, Kentucky, IS REVOKED, effective immediately. This action is taken pursuant to the authority contained in Sections 312(a)(3), (a)(4) and (c) of the Communications Act of 1934, as amended. It is taken by delegated authority.[4]

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

FOOTNOTES

[1] Although the Commission's *Order to Show Cause* included a *Notice of Apparent Liability* for willful or repeated violations of Commission rules, because of the action taken herein, no forfeiture is being imposed.

[2] Section 73.1740(a)(4) provides:

> (4) In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. no later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary.

Section 73.1750 provides:

> The licensee of each station shall notify the FCC in Washington, D.C. of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, D.C. for cancellation.

[3] In this connection, on April 6, 1989, Mega filed an application for renewal of its license (BR-890406UF). On June 21, 1989, Somerset Educational Broadcasting Foundation filed a competing application (BP-890621AH). Those aplications will be dealt with in a separate action.

[4] *See Radio Northwest Broadcasting Company*, 4 FCC Rcd 596, n. 3 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS Revisions to Tariff F.C.C. No. 15 — Transmittal No. 2265

MEMORANDUM OPINION AND ORDER

Adopted: July 30, 1990; Released: July 30, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. AT&T Communications (AT&T) filed the above-captioned tariff revisions on May 2, 1990. The scheduled effective date is July 31, 1990. These revisions introduce credits for customers of Competitive Pricing Plans[1] (CPP) 4 and 5 if delays occur in implementation of service for reasons not caused by the customer, and decrease the term of the CPP when such credits are applied. AT&T Transmittal Letter at 1-2. The amount of the credit depends on the date service is actually initiated.[2] When a delay occurs, the customer receives a one-time credit that is deducted from charges for its usage during the first month of CPP service. The credit is calculated by multiplying the CPP percentage discount (23 percent for CPP4 and 22 percent for CPP5) by the number of months the offering was delayed. AT&T claims these revisions "will have the effect, for both customers and AT&T, of ensuring that the economic impact on each party is the same as it would have been if AT&T's furnishing of the CPP had not been delayed." *Id.*

2. On May 17, 1990, Competitive Telecommunications Association (CompTel), National Telecommunications Network (NTN), and MCI Telecommunications Corporation (MCI) filed petitions to reject Transmittal 2265, and US Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject or suspend and investigate. AT&T replied on May 29, 1990.

II. PLEADINGS

3. CompTel argues that Transmittal 2265 is unlawful to the same extent as Transmittal 2087 and should be rejected. CompTel maintains that Transmittal 2265 does not cure or even address the deficiencies which render CPP4 and CPP5 unlawful. CompTel believes that the Bureau can eliminate this transmittal in the course of rejecting the CPPs. CompTel Petition at 3. Should the Bureau wish to consider the merits of Transmittal 2265, CompTel suggests that the Bureau reject it because: (1) Transmittal 2265 violates Section 204 of the Communications Act, 47 U.S.C. § 204, by retroactively revoking a Commission imposed suspension; and (2) this transmittal discriminates on its face in favor of the CPP4 and CPP5 customers and against other SDN users who are denied access to those two CPPs. CompTel notes *Id.* at 3-4.

4. CompTel also maintains that Transmittal 2265 has even more discriminatory potential than Transmittal 2087. Because this plan applies to any delay other than one requested by the customer itself, instead of applying only to a tariff suspension, CompTel believes AT&T would create delay for the purpose of awarding favored customers the additional discount. Furthermore, CompTel claims that this transmittal could result in some customers receiving retroactive discounts in excess of the amounts the customers have actually paid. CompTel claims this is possible because the credit formula sums the SDN discount percentage applicable to previous months, and then applies that cumulative percentage to a customer's usage during the first full month of service under the CPP. If the customer's usage during that first full month of service is higher than the average of the previous months while the CPP was delayed, CompTel asserts that the customer will receive a windfall beyond the "mere compensation" AT&T claims the tariff provides. *Id.* at 5-6.

5. NTN argues that the credit described in this transmittal violates Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), because it: (1) takes from the Commission the ability to preserve the *status quo* for the suspension period; (2) constitutes retroactive implementation of rate changes; and (3) permits AT&T to pay credits for service taken during a suspension period even though the suspended tariff provisions may later be held unlawful. NTN Petition at 2. NTN asserts that the net effect is the same; it makes no difference to the customer whether AT&T pays "refunds" or "credits." According to NTN, the sole impact of Transmittal 2265 on the customer is that the customer would obtain service at a net price that the Commission suspended because the tariff involved serious questions of lawfulness. NTN argues that the credits prevent the Commission from fulfilling the explicit directive of Congress to use the suspension power to prevent unlawful rate decreases from taking effect and thereby distorting the market. *Id.* at 3-5.

6. MCI also claims that Transmittal 2265 unlawfully nullifies the Commission's suspension authority under Section 204(a) of the Act. MCI states that by giving CPP4 and CPP5 *de facto* full effect during the suspension period, the credits permit AT&T to assure a targeted customer that its CPP will, in practice, take effect as initially proposed no later than 90 days after the CPP is filed with the Commission. MCI Petition at 4. MCI further argues that the Transmittal 2265 "discounts" are not really true discounts. According to it, a real discount would be structured to encourage a buyer to buy the product or service now, to order earlier, or to order in volume. It contends that the credits described in this transmittal produce none of these effects. MCI believes that the only real reason for implementing this discount plan is to negate a Commission action delaying the effectiveness of the rates. MCI says that if Transmittal 2265 is not rejected now, AT&T might extend the concept to any of its tariffs. *Id.* at 4-6. MCI further maintains that AT&T is using this filing to evade the dominant and non-dominant carrier classification system established in the Competitive Carrier decisions, [3] under which non-dominant carriers' tariffs are not subject to the same suspension standards that apply to dominant carriers' tariffs. Finally, MCI states that any relaxation of AT&T's regulatory treatment should be reserved for CC Docket 90-132,[4] the currently pending interexchange regulation proceeding. *Id.* at 6-7.

7. Sprint claims that AT&T's credits for delays in initiating service "are simply the TAP in sheep's clothing." Sprint believes the only circumstances that could cause a delay in the start of service under AT&T's latest scheme would be the suspension of the tariffs by the Commission. Sprint Petition at 1-2. Sprint asserts that the proposed credit percentages, like the TAP, allow the CPP customer to pay the same rates it would have paid had the CPP tariff not been ordered suspended; that is, the customer is credited for the difference between AT&T's standard tariff rates and the rates the customer would have been charged under the CPP. Sprint believes that AT&T's transformation of the credit mechanism from a general regulation to a customer-specific provision does not remove any of the infirmities in the underlying concept. In its view, allowing AT&T to provide such credits both undermines the power of a suspension (or the prospect of a suspension) to deter unlawful behavior, and impinges on the Commission's unreviewable discretion to suspend a tariff filing. *Id.* at 2-3.

8. AT&T replies that the petitioners' claims are wrong and wholly insufficient to warrant either rejection or suspension of Transmittal 2265. AT&T argues that petitioners have ignored the fact that the instant revisions have application completely unrelated to suspension of a tariff. AT&T Reply at 2. AT&T explains that the revisions do not interfere with the Commission's suspension authority because the discounts would only become effective at the end of a Commission-ordered suspension and, therefore, would not alter or affect the *status quo* during the pendency of a suspension. It emphasizes that the instant revisions, unlike the TAP, provide customers with a credit if the implementation of CPP4 or CPP5 is delayed for any reason through no fault of the customer. Finally, AT&T argues that these tariff revisions are in full compliance with the Commission's tariff filing rules for "dominant" interexchange carriers. *Id.* at 3-4.

III. DISCUSSION

9. After reviewing Transmittal 2265 and its associated pleadings, we conclude that the transmittal violates Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38, and therefore must be rejected as patently unlawful.[5] That section requires the carrier to supply, *inter alia*, economic information to support changed or new tariff matter. AT&T failed to provide such economic information with Transmittal 2265; instead, it merely resubmitted the cost support it originally filed with CPP4 and CPP5. Those data, of course, do not show the impact of the credit on the economic results submitted with the original CPPs. In light of this failure, we must conclude that AT&T has completely ignored Section 61.38 requirements in connection with filing Transmittal 2265, thus preventing the Bureau from assessing the effect of the credit.

10. To meet the Section 61.38 requirement for economic information for Transmittal 2265, AT&T should have revised its data for CPP4 and CPP5 to show the impact of the credit on those plans. Transmittal 2265 in some cases significantly shortens the service term for CPP4 and CPP5 and even more significantly reduces the income that AT&T will receive during the term. Thus, AT&T's assertion that its projections of demand, cost, and revenues will be unchanged does not withstand scrutiny. On the contrary, the economic results for the first 36 months of CPP4 and CPP5 as originally submitted would be very different from the results of those plans under Transmittal 2265. Because AT&T failed to file new data to support Transmittal 2265, that transmittal violates Section 61.38 of the Rules and, accordingly, is rejected.

IV. CONCLUSION AND ORDERING CLAUSES

11. For the reasons stated above, we conclude that the tariff revisions in Transmittal No. 2265 violate Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38. We therefore reject Transmittal No. 2265.

12. Accordingly, IT IS ORDERED that AT&T Communications Tariff F.C.C. No. 15, Transmittal No. 2265, IS REJECTED.

13. IT IS FURTHER ORDERED that the petitions against AT&T Communications Tariff F.C.C. No. 15, Transmittal No. 2265, filed by the above-listed petitioners ARE GRANTED to the extent discussed herein, and otherwise ARE DENIED.

14. IT IS FURTHER ORDERED that AT&T Communications SHALL ISSUE revisions to the tariff no later than five business days from the release of this Order removing the rejected material and reinstating the currently effective material. These revisions shall be scheduled to become effective on not less than one day's notice.

15. IT IS FURTHER ORDERED that Special Permission No. 90-682 is assigned and Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, are waived for the purposes of issuing the above revisions.

FEDERAL COMMUNICATIONS COMMISSION

Richard Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] CPPs are allegedly designed to respond to discounts offered by competing carriers. CPP4 and CPP5 provide discounts on Software Defined Network (SDN) Service to CBS, Inc., and La Quinta Motor Inns, Inc., respectively. CPP4 and CPP5 have been suspended and are currently under investigation. AT&T Communications Tr. No. 2185, CC Docket No. 90-327, DA 90-874, released June 25, 1990 (*Tr. 2185 Order*); AT&T Communications Tr. No. 2233, CC Docket No. 90-327, DA 90-955, released July 13, 1990 (*Tr. 2233 Order*).

[2] AT&T previously sought to implement a credit for delayed CPP service in Transmittal 2087, filed February 2, 1990. That transmittal would have introduced "Tariff Assurance Policy" (TAP) as a provision in the Tariff 15 general regulations. Under TAP, customers who ordered a CPP that was suspended by the Commission would have received a credit equal to the difference between the tariffed rates they paid during the suspension period and the rates they would have been charged under the CPP. The credit was based on actual demand of the customer during the suspension period or the period the service modified by the CPP was actually provided to the customer prior to the effectiveness of the CPP, whichever was shorter. AT&T explained that the TAP was designed to ensure that customers who elected to obtain service under Tariff 15 did not

"suffer undue economic harm" if revisions to implement CPPs were suspended before ultimately becoming effective. AT&T withdrew Transmittal 2087 as part of its Transmittal 2265 filing.

[3] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Therefor, Notice of Inquiry and Proposed Rule Making, CC Docket No. 79-252, 77 FCC 2d 308 (1979); First Report and Order, 85 FCC 2d 1 (1980); Further Notice of Proposed Rule Making, 84 FCC 2d 445 (1981); Second Report and Order, 91 FCC 2d 59 (1982), *recon. denied*, 93 FCC 2d 54 (1983); Second Further Notice of Proposed Rule Making, 47 Fed. Reg. 17308 (1982); Third Further Notice of Proposed Rule Making, 48 Fed. Reg. 28282 (1983); Third Report and Order, 48 Fed. Reg. 46791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983); Fourth Further Notice of Proposed Rule Making, 49 Fed. Reg. 11856 (1984); Fifth Report and Order, 98 FCC 2d 1191 (1984); Sixth Report and Order, 99 FCC 2d 1020 (1985), *rev'd and remanded sub nom.*, MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

[4] Competition in the Interexchange Marketplace, CC Docket No. 90-132, 5 FCC Rcd 2627 (1990).

[5] The Commission excluded Tariff 15 services from application of the price cap Rules, 47 C.F.R. §§ 61.41-61.49, and continues to review tariffs for such services pursuant to the remaining sections of Part 61. The Commission concluded that price cap treatment was inappropriate because Tariff 15 services represent long-term customized offerings and raise concerns of cross-subsidization and discrimination. Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 4 FCC Rcd 2873, 3034 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-354

In re Applications of

JEANNE T. HAEFNER (hereafter "Haefner")	File No. BPH-880727MC
ELENA G. NACANTHER (hereafter "Nacanther")	File No. BPH-880728MC
JEFFREY E. SALKIN (hereafter "Salkin")	File No. BPH-880728MN
CAPE BROADCASTING CORPORATION (hereafter "CBC")	File No. BPH-880728NM
CAPE COMMUNICATIONS CORPORATION (hereafter "CCC")	File No. BPH-880728MR (DISMISSED HEREIN)

For Construction Permit
for a New FM Station in
North Cape May, New Jersey
on Channel 294A (106.7 MHz)

HEARING DESIGNATION ORDER

Adopted: July 27, 1990; Released: August 23, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *CCC.* On May 16, 1989, CCC submitted an amendment stating that it had lost its originally specified site and that an amendment would be filed within 30 days of that date to specify a new transmitter site. No amendment has, however, been forthcoming. A technical review of CCC's original site has revealed that the North Latitude coordinates contained in Section V-G, FCC Form 301 (39^0 59' 31") do not agree with the North Latitude coordinates plotted on the applicant's topographic site map (38^0 59' 31"). Consequently, a one degree discrepancy exists between the two sets of coordinates which the staff was unable to resolve confidently and reliably by drawing upon the application as a whole.

3. In the *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19936 (May 13, 1985), the Commission adopted a "hard look" approach as to certain critical elements that are essential to a determination that an application is "substantially" complete. This approach benefits the public interest by reducing frivolous and speculative applications and streamlines our processing procedures to make more efficient use of our staff and other resources. *See, e.g., Star Signal Corporation*, 1 FCC Rcd 450 (1986); *Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 (1986). Further, in Appendix D to the *Report and Order, supra*, we stated that the absence of the geographic coordinates *to the nearest second*, would prevent a determination of acceptability and thus renders the application not substantially complete. Thus, in the instant case, the inconsistencies in the North Latitude coordinates make it impossible to determine either the veracity of the site availability certification, the environmental impact statement, or the information supplied for FAA approval. *See, e.g., Steven B. Courts*, 4 FCC Rcd 4746 (1989). Accordingly, we conclude that CCC's application was inadvertently accepted for filing and will be dismissed.

4. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Nacanther	December 22, 1988
Salkin	January 24, 1990; May 30, 1990
CBC	January 24, 1990

5. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicants below have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by Haefner, Nacanther, and CBC would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

6. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Haefner, Nacanther, and CBC would constitute hazards to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That the application of CCC IS HEREBY DISMISSED.

10. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Nacanther, Salkin, and CBC ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

11. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

12. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

13. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

14. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-419

In the Matter of

Amendment of Section 73.202(b), RM-6822
Table of Allotments,
FM Broadcast Stations.
(Bunkie, Louisiana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 6, 1990; Released: August 23, 1990

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 4 FCC Rcd 7067 (1989), issued in response to a petition for rule making filed by Owensville Communications Company (petitioner), permittee of Station KRBG(FM), Channel 282A at Bunkie, Louisiana, proposing the substitution of Channel 282C3 for Channel 282A at Bunkie, and the modification of the construction permit for Station KRBG(FM) to specify operation on the higher class channel. Petitioner filed supporting comments restating its intention to apply for the channel, if allotted.

2. We believe the public interest would be served by substituting Channel 282C3 for Channel 282A at Bunkie, Louisiana, providing that community with its first wide coverage area FM service. Channel 282C3 can be allotted to Bunkie in compliance with the Commission's minimum distance separation requirements with a site restriction of 11.3 kilometers (7 miles) north of the city.[1]

3. As requested, we are modifying the license of Station KRBG(FM) to specify operation on Channel 282C3 in accordance with Section 1.420(g) of the Commission's Rules.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 10, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Bunkie, Louisiana	282C3

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KRBG(FM), IS MODIFIED, to specify operation on Channel 282C3 in lieu of Channel 282A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for the site specified by the petitioner are 31-02-56 and 92-08-34. Because this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, the permittee may avail itself of the provisions of Section 73.213(c)(1) of the Commission's rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-511

In the Matter of

Amendment of Section 73.202(b), RM-6941
Table of Allotments,
FM Broadcast Stations.
(Shawano, Wisconsin)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 1, 1990; Released: August 23, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 8172 (1989), issued in response to a petition filed by Wheeler Broadcasting, Incorporated (petitioner), requesting the substitution of FM Channel 257C3 for Channel 257A at Shawano, Wisconsin. Petitioner also requested modification of its license for Station WOWN(FM) to specify operation on the higher class channel. Petitioner filed supporting comments in which it reaffirmed its interest in the channel.

2. We believe the public interest would be served by the substitution of FM Channel 257C3 for Channel 257A at Shawano, Wisconsin, since it could provide the community with its first wide coverage area FM service. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at petitioner's specified site.[1] As requested, we are authorizing a modification of petitioner's license for Station WOWN(FM), Shawano, to specify operation on Channel 257C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 10, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Shawano, Wisconsin	257C3

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WOWN(FM), Shawano, Wisconsin, IS MODIFIED to specify operation on Channel 257C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 257C3 are 44-50-52 and 88-24-28. The site is located 17.6 kilometers (10.9 miles) northeast of Shawano. Because the petition which resulted in this allotment was filed prior to October 2, 1989, the licensee may avail itself of the provision of Section 73.213(c) of the Commission's Rules. *See* 47 C.F.R. § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-557

In the Matter of

Amendment of Section 73.202(b), RM-7043
Table of Allotments,
FM Broadcast Stations.
(Lumberton, Mississippi)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 7, 1990; Released: August 23, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 8488 (1989), issued in response to a petition filed by Stone-Lamar Broadcast Services Corporation (petitioner), proposing the substitution of FM Channel 237C2 for Channel 237A at Lumberton, Mississippi, and modification of its license for Station WLUN, to specify the higher class channel. Petitioner filed supporting comments in which it reaffirmed its interest in the channel.

2. We believe the public interest would be served by the substitution of Channel 237C2 for Channel 237A at Lumberton, Mississippi, since it could provide the community with its first wide coverage area FM station. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at petitioner's specified site.[1] In addition, we have authorized a modification of the petitioner's license for Station WLUN, Lumberton, Mississippi, to specify operation on Channel 237C2 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 10, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Lumberton, Mississippi	237C2

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WLUN, Lumberton, Mississippi, IS MODIFIED to specify operation on Channel 237C2, in lieu of Channel 237A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 237C2 are 30-51-30 and 89-11-29. Because the petition for rule making in this proceeding was filed prior to October 2, 1989, the licensee may avail itself of the provisions of Section 73.213(c) of the Commission's Rules. *See* 47 C.F.R. § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-392

In the Matter of

Amendment of Section 73.202(b), RM-6766
Table of Allotments,
FM Broadcast Stations.
(Clinton and Varnado, Louisiana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 7, 1990; Released: August 23, 1990

By the Deputy Chief, Policy and Rules Division:

1. At the request of Hoffman Media of Louisiana, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause*, 4 FCC Rcd 6907 (1989), proposing the substitution of Channel 224C2 for Channel 224A at Clinton, Louisiana, and the modification of its license for Station WQCK(FM) to specify operation on the higher powered channel. In order to accomplish the upgrade at Clinton, the petitioner requested the substitution of Channel 225A for Channel 224A at Varnado, Louisiana, and the modification of the license of The Bogue Chitto Communication Company ("Bogue Chitto") for Station WBOX-FM to specify the alternate Class A channel. An *Order to Show Cause* was issued to Bogue Chitto. The petitioner and Bogue Chitto filed comments and petitioner filed reply comments.

2. In comments, the petitioner reiterates its intention to apply for Channel 224C2, if allotted to Clinton. Petitioner also states its willingness to reimburse Bogue Chitto for the legitimate and prudent out-of-pocket costs incurred in modifying the operation of Station WBOX-FM at Varnado to Channel 225A.

3. Bogue Chitto filed comments opposing the substitution of Channel 225A for Channel 224A at Varnado. Bogue Chitto states that such a change would be disruptive to Station WBOX-FM's operations and its audience. However, it states that if the Commission decides to adopt the proposed channel substitution, it must also make clear the petitioner's reimbursement obligation.

4. In its reply comments, the petitioner states that Bogue Chitto has raised no substantial and material question of fact that would require a hearing on the proposed change, and that Bogue Chitto has raised no sufficiently countervailing public interest reasons to warrant a denial of the proposal. The petitioner again submits that it will comply with Commission policy and precedent in reimbursing Bogue Chitto for the expenses incurred in changing its channel.

5. After careful consideration of the comments, we believe the public interest would be served by substituting Channel 224C2 for Channel 224A at Clinton, Louisiana, since it could enable Station WQCK(FM) to expand its coverage area. As proposed, we will modify petitioner's license for Station WQCK(FM) to specify operation on the higher powered channel. We find that Bogue Chitto's opposition to the modification of its license at Varnado does not present a sufficient showing to warrant a denial of the proposal or a hearing. Without elucidation, it states that the substitution of channels would be disruptive to the operation of the station and its audience. However, as the Commission has held on numerous occasions, the substitution of an existing station's channel at one community serves the public interest where the substitution permits the provision of a new or expanded service at another community. *See, e.g., Marietta, Ohio and Ravenswood, West Virginia*, 2 FCC Rcd 4681 (1987), *Albany, New York, et al.*, 2 FCC Rcd 4300 (1987), 3 FCC Rcd 4681 (1987), and *Fort Madison, Iowa, and Louisiana, Missouri*, 4 FCC Rcd 7774 (1989). In accordance with Commission policy, the petitioner will be required to reimburse Bogue Chitto for the reasonable and necessary expenses incurred in changing channels.

6. Channel 224C2 can be allotted to Clinton in compliance with the Commission's minimum distance separation requirements at Station WQCK(FM)'s licensed transmitter site.[1] Channel 225A can be substituted for Channel 224A at Varnado, Louisiana, in compliance with the Commission's minimum distance separation requirements and can be used at Station WBOX-FM's licensed transmitter site.[2]

7. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 10, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Clinton, Louisiana	224C2
Varnado, Louisiana	225A

8. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Hoffman Media of Louisiana for Station WQCK(FM), Clinton, Louisiana, IS MODIFIED, to specify operation on Channel 224C2 in lieu of Channel 224A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

9. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Bogue Chitto Communication

Company for Station WBOX-FM, Varnado, Louisiana, IS MODIFIED, to specify operation on Channel 225A in lieu of Channel 224A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WBOX-FM's license, BLH-851227KA, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-851227KA, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

10. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Order* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the following: Bogue Chitto Communication Company, P.O. Box 351, Columbia, MS 39429.

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The coordinates for Channel 224C2 at Clinton, Louisiana, are 30-55-54 and 91-06-43.

[2] The coordinates for Channel 225A at Varnado, Louisiana, are 30-54-10 and 89-57-36.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-174

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Red Oak and Falls City, Nebraska)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 6, 1990; Released: August 23, 1990

By the Deputy Chief, Policy and Rules Division:

1. By *Notice of Proposed Rule Making*, 4 FCC Rcd 4904 (1989), the Commission, on its own motion, proposed the substitution of Channel 237C3 for Channel 237A at Red Oak, Iowa, and the modification of Station KOAK-FM's license to specify the higher powered channel. Montgomery County Broadcasting Co., Inc. ("Montgomery County"), licensee of Station KOAK-FM, filed comments stating its intention to apply for Channel 237C3, if allotted. However, in reviewing the Commission's records, the staff found that the proposed allotment of Channel 237C3 to Red Oak conflicted with unoccupied and unapplied for Channel 237A at Falls City, Nebraska. Red Oak and Falls City are located 111 kilometers apart while the Commission's Rules stipulate a minimum separation of 142 kilometers between co-channel Class A and C3 allotments. Therefore, on its own motion, the Commission issued a *Further Notice of Proposed Rule Making*, 5 FCC Rcd 1299 (1990), proposing the substitution of Channel 267A for Channel 237A at Falls City to accommodate the upgrade at Red Oak.

2. Montgomery County and Southeast Nebraska Broadcasting Company ("Southeast") filed comments supporting the *Further Notice*. Montgomery County reiterates its intention to apply for Channel 237C3 at Red Oak. Southeast supports the allotment of Channel 267A to Falls City and states an intention to apply for the channel, if allotted. However, it requests that the Commission impose a site restriction on the Falls City allotment. Southeast states that the requested site restriction reflects a particular piece of property which it intends to specify as its proposed transmitter site. In reply comments, Montgomery County notes the support of Southeast in the allotment of Channel 267A to Falls City and requests immediate adoption of the proposals.

3. We believe the public interest would be served by substituting Channel 237C3 for Channel 237A at Red Oak, and substituting Channel 267A for Channel 237A at Falls City since it could enable Station KOAK-FM to expand its coverage area. Channel 237C3 can be allotted to Red Oak in compliance with the Commission's minimum distance separation requirements and can be used at Station KOAK-FM's licensed transmitter site. Channel 267A can be allotted to Falls City in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

4. We will not impose the site restriction requested by Southeast on the Falls City allotment. Where, as here, a channel allotment is subject to application by all interested parties, the Commission will not protect a prospective applicant's preferred site. Rather, in order to preclude as few future allotments as possible, as well as provide as much flexibility as possible to all prospective applicants in selecting transmitter sites, the Commission imposes the least restrictive site restriction possible. Further, there is no guarantee that the petitioning party will ultimately be awarded the construction permit. In this instance, no site restriction is required. However, even though the Commission will not protect the specific transmitter site requested at the rule making stage, Southeast may specify its preferred transmitter site in its application as long as there is no conflict with any authorized facility or pending allotment.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 10, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Red Oak, Iowa	237C3
Falls City, Nebraska	267A

6. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Montgomery County Broadcasting Co., Inc. for Station KOAK-FM, Red Oak, Iowa, IS MODIFIED to specify operation on Channel 237C3, in lieu of Channel 237A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. The window period for filing applications for Channel 267A at Falls City, Nebraska, will open on **October 11, 1990,** and close on **November 13, 1990.**

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 237C3 at Red Oak are North Latitude 41-01-00 and West Longitude 95-12-46. The coordinates for Channel 267A at Falls City are North Latitude 40-03-39 and West Longitude 95-36-06.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Liability for Forfeiture of

VALLEY MOBILE
COMMUNICATIONS, INC.

Notice of Apparent Liability File No. 63500-89-41-RPS
for Forfeiture for failure to file
application for renewal of Station
KOR872 in the Public Land Mobile Service
at Palmdale, California

Notice of Apparent Liability File No. 63500-89-42-RPS
for Forfeiture for failure to file
application for renewal of Station
KMD690 in the Public Land Mobile Service
at Mt. Emma and Lancaster, California

MEMORANDUM OPINION AND ORDER

Adopted: August 17, 1990; Released: August 24, 1990

By the Chief, Mobile Services Division:

1. Valley Mobile Communications, Inc. ("Valley") has filed a "Statement in Support of Cancellation of Notice of Apparent Liability for Forfeiture" of two forfeitures totaling $2,040.00 imposed by the Mobile Services Division ("MSD") in the "Notices of Apparent Liability for Forfeiture" (" *NALFs")* which were issued on July 21, 1989.

I. BACKGROUND

2. On April 22, 1982, the MSD granted Valley authority to construct and operate frequency 158.70 MHz base station facilities for Station KOR872 at Palmdale, California; on April 24, 1982, the MSD granted Valley authority to construct and operate base station facilities on frequencies 152.03 MHz and 152.12 MHz for Station KMD690 at Mt. Emma and Lancaster, California. Valley's authorizations for both station expired on April 1, 1989. On July 11, 1989, Valley filed requests for Special Temporary Authority ("STA") to continue to operate Stations KOR872 and KMD690, pending Commission action on Valley's applications for reinstatement of the two expired authorizations. On July 21, 1989, the MSD issued two separate *NALFs,* finding that an apparent violation of Section 22.3(b) of the Commission's Rules had occurred for operation of an unauthorized station, and imposed a forfeiture of $1,020.00 in each *NALF.*

II. VALLEY'S CONTENTIONS

3. Valley states that when it received both authorizations, it thought that the operating authority was granted for a 10-year period, pursuant to Section 22.45 of the Commission's Rules. Valley argues that it neither received, nor was aware of, the *Public Notice,* Mimeo No. 2661 (released Apr. 21, 1988), which stated in relevant part that all non-wireline common carriers must file DPLMR renewal applications on or shortly before April 1, 1989. Valley asserts that a Commission authorization does not lapse, even though it might have expired on its face, until the Commission specifically declares the authorization forfeit. Thus, Valley contends that its continued operation did not constitute "unauthorized operation" as stated in the *NALFs.*

4. Valley argues that there was neither any violation of Section 22.3 nor any "willful" or "repeated" failure on Valley's part to comply with Commission rules or orders. Although acknowledging its inadvertent delay in filing the renewal applications due to unawareness of the *Public Notice,* Valley argues that its three-month delay did not affect the public served by Valley. Furthermore, Valley argues that there is nothing in the *NALFs* indicating that consideration was given to "the nature, circumstances, extent, and gravity of the prohibited acts committed and....[Valley's] degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require", pursuant to Section 503(b)(2) of the Communications Act, as amended. Valley asserts that even assuming *arguendo* a rule violation, it was minor and that in no circumstances is a monetary forfeiture justified.

III. DISCUSSION

5. After carefully reviewing the facts and Valley's assertions, we decline to grant its request for cancellation of the two forfeitures. A licensee is responsible for complying with Commission rules and is responsible for its own acts or omissions. *See, e.g., Lorain Community Broadcasting Co.,* 18 FCC 2d 686 (1969) (applicant, not communications counsel, must be held responsible for compliance with the Commission's rules); *Roberts Cellular, Inc.,* 5 FCC Rcd 1357 (an applicant, not its agent or the firm preparing its application, is entirely responsible for the contents of its application). The MSD's records indicate that Valley's authorization for Station KMD690 had an expiration date of April 1, 1984. Accordingly, based on the expiration date on its authorization of April 1, 1984, Valley knew that it did not get a ten-year grant of authority. Had Valley tried to renew its license in 1984, it would have been informed that it did not have to renew until 1989.

6. We disagree with Valley that an authorization does not lapse until the Commission declares the authorization forfeited. Section 22.44(a)(1) of the Commission's Rules states: "All authorizations shall terminate on the date specified on the authorization or on the date specified by these rules, unless a timely application for renewal has been filed." Therefore, Valley's operation after its authorization terminated without a timely renewal constituted unauthorized operation. The cases cited by Valley[1] are inapposite because they stand for the proposition that a construction permit remains in effect until the Commission forfeits it, or until the abandonment of the permit by the permittee or a valid administrative action has occurred. The instant proceeding did not involve a construction authorization. Furthermore, we disagree with Valley that we changed the license term by public notice. The Commission by order established a schedule, on a service-by-service basis, of the dates on which licenses expire. *See Common Carrier and Satellite Licensing Procedures Pursu-*

ant to the Communications Amendments Act of 1982, 53 Rad. Reg. 2d (P&F) 1514 (1983), at note 11 (" *Licensing Order* "). Furthermore, Section 22.45 of the Commission's Rules establishes the license period. In addition, the Commission issued *Public Notice*, Mimeo No. 2661 (released Apr. 21, 1988) explaining that the *Licensing Order* had extended the licensing period until 1989.

7. The fact that Valley's failure to file timely its renewal applications was the result of "inadvertent delay" does not alter the fact that unauthorized operation existed and that the violation continued over a period of time. We have previously noted that

> "[t]he fact that the applicant's violation occurred through inadvertence does not prevent it from being willful. It is not necessary that the violation be intentional. All that is necessary is that the licensee knew he was doing the act in question . . . ."

Mobile Radio Telephone & Paging Service, Inc., Mimeo No. 2397 (Com. Car. Bur., released Feb. 16, 1983). *See also* Section 312(f) of the Communications Act, as amended, which defines "willful". Thus, the fact that the violation resulted from an "inadvertent delay" does not persuade us to cancel the forfeitures. Furthermore, we reject Valley's assertion that its three-month delay had no affect on the public served by Valley. Valley failed to operate in the public interest because of its unauthorized operation. *Cf. Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 372 (1969), at note 3; *Armond J. Rolle*, 31 FCC 2d 533, 535 (1971). Additionally, the nature, circumstances, extent, and gravity of the prohibited acts, as well as Valley's degree of culpability, and history of prior offenses were already taken into account in setting the proposed forfeitures. *See* Section 503(b)(2)(B) of the Communications Act; *Delray Cellular Associates*, 4 FCC Rcd 2233 (1989). As to Valley's ability to pay, Valley has made no financial-hardship allegations involving the proposed forfeitures.

8. In conclusion, Valley has not justified cancellation of either forfeiture imposed by the respective *NALF* and, consequently, we uphold both forfeitures, totaling $2,040.00.

IV. ORDERING PARAGRAPHS

9. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80(f)(4) of the Commission's Rules, 47 C.F.R. § 1.80(f)(4), IT IS ORDERED that Valley Mobile Communications, Inc. FORFEIT to the United States the sum of Two Thousand Forty Dollars ($2,040.00) for the violations of Section 22.3(b) of the Commission's Rules. Payment of the forfeitures may be made by mailing a check or similar instrument to the Commission within thirty (30) days of release of this Order to: Federal Communications Commission, Fee Section, Finance Branch, P. O. Box 19209, Washington, DC 20036.

10. IT IS FURTHER ORDERED that if said forfeitures are not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act, as amended, 47 U.S.C. § 504(a).

11. IT IS FURTHER ORDERED that a copy of this Order BE SENT to Valley Mobile Communications, Inc. Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTE

[1] Edward A. Baker v. FCC, 834 F.2d 181 (D.C. Cir. 1987); MG-TV Broadcasting Co. v. FCC, 408 F.2d 1257, 1261 (D.C. Cir. 1968); and Mass Communicators, Inc. v. FCC, 266 F.2d 681 (D.C. Cir. 1959), *cert. denied*, 361 U.S. 828 (1959).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Temporary Waiver of the Maritime
Services Rules (Part 80) to
Permit Use of VHF Maritime
Channel 9 as a Secondary Calling
Channel in Boston Harbor

ORDER

Adopted: August 17, 1990; Released: August 21, 1990

By the Deputy Chief, Private Radio Bureau

1. The continuing increase in the pleasure boating population[1] has resulted in considerable congestion on certain VHF maritime channels.[2] The congestion is especially heavy on channel 16 in urban boating areas such as Boston Harbor, Boston, Massachusetts. Channel 16 is the channel set aside for distress calling, and as well as the VHF "calling" channel. [3] Congestion on channel 16 resulting from increased calling lessens the likelihood that distress messages will be heard by other vessels or by the U.S. Coast Guard.

2. One way to reduce the congestion on channel 16 is to allow another channel to be used for "calling". We plan to investigate this matter through a rule making procedure in the very near future. In the interim, to obtain information that we believe would be helpful to this investigation, we will conduct a test of the second calling channel concept in a congested harbor.

3. This Order provides a general waiver of Section 80.373(f) of the Commission's Rules, 47 C.F.R. §80.373(f), to permit, on a temporary or "trial" basis, the use of maritime channel 09 as an alternative to channel 16, for "calling" purposes. This Order is limited in its effect to non-commercial operations within Boston Harbor and its associated outer islands.

4. This action will provide valuable information in our investigation of using a second calling channel to lessen congestion on channel 16 thereby promoting safety and providing other public benefits. We find that this departure from Section 80.373(f) is in the public interest, and constitutes good cause to issue this waiver. Consistent with the use of channel 09 for calling by eligible vessels, we are also waiving the channel 16 watch requirement[4] for those vessels opting to use channel 09 under this Order. Such vessels should, however, continue to use channel 16 for transmitting safety and distress messages.

5. Private coast stations in the vicinity of Boston Harbor currently licensed to use channel 09 for noncommercial operations might wish to change their operations to another channel, and we will work with these licensees to arrange alternative channels for their use. The Commission and the Coast Guard will monitor the effect of this waiver on channel 16 congestion. This Order will become effective immediately, and the trial period will last for approximately two years from the Order's effective date.

6. IT IS THEREFORE ORDERED, pursuant to the authority contained in Sections 0.331 and 1.3 of the Commission's Rules, 47 C.F.R. §§ 0.331, 1.3, that Section 80.373(f) of the Commission's Rules, 47 C.F.R §80.373(f), IS WAIVED to the extent that VHF maritime channel 09 (156.450 MHz) may be used as a "calling" channel in Boston Harbor and its associated outer islands, Boston, Massachusetts, by non-commercial users in lieu of channel 16. This Order is effective August 17, 1990, and remains in effect until September 30, 1992.

FEDERAL COMMUNICATIONS COMMISSION

Beverly G. Baker
Deputy Chief, Private Radio Bureau

FOOTNOTES

[1] Pleasure boats typically are not required by Commission regulation to carry radio equipment. Such vessels may and often times do, on a voluntary basis, carry such equipment and use the maritime VHF channels assigned for non-commercial operations.

[2] *See generally* FY-88 Boston Marine Safety Project Report (Nov. 4, 1988); FY-87 Regional Marine Safety Project Report (Jan. 26, 1988). Both studies can be found at the Commission Library.

[3] A "calling" channel serves as the gateway to the other "working" channels.

[4] *See* Sections 80.148, 80.310, and 80.1153 of the Commission's Rules, 47 C.F.R. §§ 80.148, 80.310, 80.1153.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-384

In the Matter of

Amendment of Section 73.202(b), RM-7286
Table of Allotments,
FM Broadcast Stations.
(Bethlehem, West Virginia)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 13, 1990; Released: August 24, 1990

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by Bethlehem Radio, Inc. (petitioner), seeking the substitution of Channel 288B1 for Channel 288A at Bethlehem, West Virginia, and the modification of the license for Station WHLX(FM) at Bethlehem to specify the higher powered channel. Petitioner seeks to upgrade the current station's operation to provide expanded FM service.

2. Our engineering analysis reveals that Channel 288B1 can be allotted to Bethlehem consistent with the Commission's minimum distance separation requirements at the site specified by the petitioner.[1] Since Bethlehem is located within 320 kilometers (200 miles) of the U.S.-Canadian border, we must obtain concurrence of the Canadian government for the proposal.

3. As requested, we shall propose to modify the license for Station WHLX(FM) at Bethlehem to specify operation on Channel 288B1. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest or require that the petitioner demonstrate the availability of an additional equivalent channel at Bethlehem.

4. In view of the fact that Bethlehem, West Virginia, could receive an expanded FM service, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Bethlehem, West Virginia	228A	228B1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **October 15, 1990,** and reply comments on or before **October 30, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John F. Garziglia
Pepper & Corazzini
1776 K Street, N.W.
Suite 200
Washington, D.C. 20006
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Andrew J. Rhodes, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates are 40-09-32 and 80-45-58, located at a site 14.3 kilometers (8.9 miles) northwest of Bethlehem.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-385

In the Matter of

Amendment of Section 73.202(b), RM-7220
Table of Allotments,
FM Broadcast Stations.
(Trade, Tennessee)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 13, 1990; Released: August 24, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it a petition for rule making filed by Trade Communications of Mountain City, Tennessee (petitioner), requesting the allotment of Channel 272A at Trade, Tennessee, as that community's first local broadcast service.[1] Petitioner states that it will apply for the channel, if allotted.

2. Section 307(b) of the Communications Act of 1934, as amended, requires that the Commission fairly, equitably, and efficiently distribute frequencies " . . . among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to satisfy its status. Trade is not listed in the U.S. Census.[2] Therefore, the petitioner should present the Commission with sufficient information to demonstrate that Trade has social, economic, cultural, or governmental indicia to qualify it as a "community" for allotment purposes. *See, e.g., Oak Grove, Florida*, 5 FCC Rcd 3774 (1990); *Hannibal, Ohio*, 5 FCC Rcd 3315 (1990); *Statenville, Georgia*, 5 FCC Rcd 2685 (1990); *Columbia, California*, 5 FCC Rcd 2003 (1990); and *Beaver Springs, Pennsylvania*, 4 FCC Rcd 5373 (1989).

3. Channel 272A can be allotted to Trade, Tennessee, in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.9 kilometers (4.9 miles) south [3] in order to avoid short-spacings to Stations WJMH(FM), Channel 271C, Reidsville, North Carolina, WOLD-FM, Channel 273A, Marion, Virginia, and WMYI(FM), Channel 273C1, Henderson, North Carolina.

4. We believe the public interest would be served by proposing the allotment of Channel 272A at Trade, Tennessee, if it is ultimately found to be a community for allotment purposes, since an interest has been expressed in providing that locality with its first local broadcast service. Accordingly, we seek comments on the proposal to amend the FM Table of Allotments. Section 73.202(b) of the Commission's Rules, with respect to Trade, Tennessee, as follows:

	Channel No.	
City	Present	Proposed
Trade, Tennessee	--	272A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **October 15, 1990,** and reply comments on or before **October 30, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Mitch Sandidge
212 Amity Drive
Bristol, Tennessee 37620
(Consultant)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Andrew J. Rhodes, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief,
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] We note that petitioner's request was signed by its technical consultant, and we are unable to determine from the petition if petitioner's consultant is also a principal of the petitioner. Although a petitioner may seek assistance in the preparation of a pleading or petition for rule making, Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission be signed and verified by the commenting or petitioning party and his/her address stated, unless they are represented by counsel. Therefore, petitioner is requested to clarify this matter and comply with the requirements of Section 1.52 in submitting its comments. Failure to do so could result in dismissal of the petition.

[2] Trade is listed in the 1988 Rand McNally Commercial Atlas ("Atlas"), and attributed with a population of 150 persons. However, mere geographical location is not sufficient to establish "community" status. *See Vimville, Mississippi,* 48 FR 5974 (1983). Moreover, although the Atlas credits Trade with a post office and its own zip code, these items are an insufficient basis on which to determine whether there is the community interest and need on which to base an FM allotment. *See Oak Beach and Bay Shore, New York,* 57 RR 2d 1275 (1985).

[3] Coordinates for Channel 272A at Trade, Tennessee, are 36-17-00 and 81-46-45.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-401

In the Matter of

Amendment of Section 73.202(b), RM-6854
Table of Allotments,
FM Broadcast Stations.
(Merrill, Wisconsin)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 7, 1990; Released: August 24, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 6894 (1989), issued in response to a petition filed by Roberts Broadcasting, Inc. (petitioner), proposing the substitution of FM Channel 281C3 for Channel 281A at Merrill, Wisconsin. Petitioner also requested modification of its license for Station WMZK(FM), Channel 281A, to specify operation on the new channel. Petitioner filed supporting comments in which it reaffirmed its interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 281C3 for Channel 281A at Merrill, Wisconsin, since it could provide the community with its first wide coverage FM station. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at petitioner's specified site.[1] Since Merrill is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained for this allotment. In addition, we are modifiying the petitioner's license for Station WMZK(FM), Merrill, Wisconsin, to specify operation on Channel 281C3 in accordance with Section 1.420(g) of the Commission's Rules.[2]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 9, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Merrill, Wisconsin	281C3

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WMZK(FM), Merrill, Wisconsin, IS MODIFIED to specify operation on Channel 281C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The coordinates for Channel 281C3 are 45-10-45 and 89-38-20.

[2] Because this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, the licensee may avail itself of the provisions of Section 73.213(c) of the Commission's Rules. *See* 47 C.F.R. § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-386

In the Matter of

Amendment of Section 73.202(b), RM-7276
Table of Allotments,
FM Broadcast Stations.
(Pullman, Washington)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 13, 1990; Released: August 24, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by P-N-P Broadcasting, Inc. (petitioner) requesting the substitution of Channel 258C1 for Channel 258C2 at Pullman, Washington, and the modification of its construction permit for Station KZZL-FM to specify operation on the higher powered channel. Petitioner states that it will apply for Channel 258C1, if allotted to Pullman.

2. In support, petitioner states that Channel 258 was originally allotted to Pullman as a Class C but was downgraded to a Class C2 in order to permit use of a transmitter site on Paradise Ridge without being short-spaced to an IF related station. With the adoption of new minimum distance separation requirements in MM Docket 86-144, petitioner states that the short-spacing has been eliminated and the channel can be upgraded to a Class C1. *See Third Report and Order*, 4 FCC Rcd 3557 (1989). Channel 258C1 can be allotted to Pullman in compliance with the Commission's minimum distance separation requirements with a site restriction of 16.8 kilometers (10.4 miles) east to avoid a short-spacing to Station KKZX(FM), Channel 255C, Spokane, Washington.[1] Canadian concurrence is required because Pullman is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. As requested, we also propose to modify the construction permit of Station KZZL-FM to specify operation on Channel 258C1 in lieu of Channel 258C2. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 258C1 at Pullman or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. We believe the public interest would be served by proposing the substitution of Channel 258C1 for Channel 258C2 at Pullman, Washington, since it could enable Station KZZL-FM to expand its coverage area. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

City	Channel No. Present	Proposed
Pullman, Washington	258C2, 282C1	258C1, 282C1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **October 15, 1990,** and reply comments on or before **October 30, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Duane J. Polich, President
P-N-P Broadcasting, Inc.
P.O. Box 2869
Othello, Washington 99344
(Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 258C1 at Pullman, Washington, are North Latitude 46-40-32 and West Longitude 116-58-06. These coordinates are not those proposed by the petitioner. The coordinates which petitioner requested would result in a 0.7 kilometer short-spacing to Station KKZX(FM).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-119

In re Applications of

SILVER SPRINGS COMMUNICATIONS	File No. BPH-870630MS
A. P. WALTER, JR.	File No. BPH-870630MU
SILVER SPRINGS RADIO COMMUNICATIONS, LTD.	File No. BPH-870630MW
SILVER RADIO PARTNERS	File No. BPH-870630MX

For Construction Permit for
New FM Broadcast Station, Channel 238A,
Silver Springs, Florida

MEMORANDUM OPINION AND ORDER

Adopted: August 9, 1990; Released: August 24, 1990

By the Review Board: MARINO (Chairman), and BLUMENTHAL. Board Member ESBENSEN not participating.

1. By *Memorandum Opinion and Order*, FCC 90R-71, adopted July 25, 1990, the Review Board approved a settlement agreement filed jointly by the above-captioned applicants, granted the Construction Permit application of Silver Springs Communications (SSC) for the instant facility, and terminated the proceeding. The Board now has before it a petition filed by SSC on August 1, 1990, in which it seeks (1) leave to amend its application to reflect a change in ownership; and (2) consent to relocate its transmitting antenna. The Board has ancillary jurisdiction over this proceeding. 47 CFR § 1.113(a) (Board has jurisdiction for 30 days to modify or set aside any action taken pursuant to delegated authority).

2. According to the proffered amendment, one of SSC's three general partners, Bob Stoehr, would become the applicant's sole owner, and remain integrated at the proposed facility as its station manager. Under current Commission policy, settlement agreements terminating comparative proceedings generally relieve applicants of integration and diversification commitments made in the course of comparative proceedings. *See Ruarch Associates*, 103 FCC 2d 1178, 1180 (Comm'n 1986); *Mark L. Wodlinger*, FCC 89I-04, released January 10, 1989 (integration and diversification pledges not binding since no longer a comparative case); *Breaux Bridge Broadcasters Limited Partnership*, 4 FCC Rcd 5409 (Rev. Bd. 1989); *WCVQ, Inc.*, 4 FCC Rcd 4079 (Rev. Bd. 1989), *modified*, FCC 90-224, released June 26, 1990. [1] We discern no legal basis for disregarding that policy here.

3. SSC submits that its antenna site amendment should be accepted, since the new site purportedly would not alter the coverage area of the station or create a hazard to air navigation or to the environment. However, this proposed amendment must be processed by the Mass Media Bureau, "upon whose technical expertise the Commission relies in matters of this nature." *Agape Broadcasting Foundation, Inc.*, 2 FCC Rcd 5491 (Rev. Bd. 1987). The Board has no delegated authority to process engineering amendments. [2]

4. ACCORDINGLY, IT IS ORDERED, That the petition for leave to amend filed by Silver Springs Communications on August 1, 1990 IS GRANTED to the extent indicated herein, and the amendment as it pertains to an ownership change in Silver Springs Communications IS ACCEPTED; and

5. IT IS FURTHER ORDERED, That the remainder of the pleadings ARE REFERRED to the Chief, Mass Media Bureau for appropriate disposition.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] *But cf. Proposal to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, FCC 90-194 released June 26, 1990 (*Ruarch* policy under reconsideration).

[2] Pre-publication copies of this *Order* have been made available to the parties.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-407

In re Applications of

RICHARDSON BROADCASTING GROUP	File No. BPH-870824MG
ELIZABETH M. YOUNTS	File No. BPH-870824MH
GREENE BROADCASTING, INC.	File No. BPH-870824MI

For Construction Permit for a
New FM Station, Channel 273A
Southern Pines, North Carolina

Appearances

Dan J. Alpert and *Ann Bavender*, on behalf of Richardson Broadcasting Group; *David D. Oxenford*, *John K. Hane* III, and *Gregory L. Masters*, on behalf of Elizabeth M. Younts; *Mark J. Prak* and *Daniel W. Clark*, on behalf of Greene Broadcasting, Inc.; and *Gary P. Schonman*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

Adopted: August 7, 1990; Released: August 24, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN. Board Member ESBENSEN issuing Separate Statement.

Board Member BLUMENTHAL:

1. The Review Board has before it the *Initial Decision*, 4 FCC Rcd 7989 (1989) (*I.D.*) of Administrative Law Judge Walter C. Miller (ALJ), granting the application of Greene Broadcasting, Inc. (GBI) for authority to construct and operate a new FM broadcast station on Channel 273A at Southern Pines, North Carolina. Exceptions were filed by mutually exclusive applicants Richardson Broadcasting Group (RBG), Elizabeth M. Younts (Younts), and GBI, and by the Mass Media Bureau. The applicants also filed reply briefs. Oral Argument was heard on May 11, 1990. [1]

2. The *I.D.* awarded the Construction Permit at contest to GBI, primarily because: (1) although the ALJ found RBG "substantially" superior to GBI on the comparative criteria of local ownership and civic activities, and superior as well on broadcast experience, he awarded GBI a "*substantial* and *decisionally significant*" preference over RBG on "environmental impact" (*see I.D.*, *Concls.*, paras. 23-25; emphasis in original); and (2) the ALJ gave no ownership/management integration credit to Younts, finding her to be a "chronic liar" (*id.*, *Concls.*, at para. 22). For the reasons set out below, we reverse the failure of the ALJ to award "integration" credit to Younts, and hold that she should prevail under the Commission's comparative criteria.

YOUNTS

3. *Integration*. Originally filed as the sole proprietorship of Jack Younts, the late husband of Elizabeth Younts who expired while awaiting the processing of his application, the *Hearing Designation Order*, 3 FCC Rcd 5453 (1988) (*HDO*), permitted the substitution of his wife as the successor applicant, with the caveat that "Younts will not be allowed to improve its comparative position" by the substitution. *Id.* However, throughout the *I. D.* Elizabeth Younts was reviled as "an inveterate liar" who was "evasive, contradictory and displayed a lack of candor," *id.*, at para. 40, so the ALJ concluded that "it would be dangerous to credit any part of her integration claim." *Id.*, *Concls.* at para. 13. More specifically, the ALJ stated:

> She dissembled about: (1) her age; (2) her past employment history and her present status as a retired person; (3) her true residence; (4) the past and possible future involvement of her children in the application and proposed station; and (5) about whether her late husband, Jack Younts, intended to serve as General Manager of the proposed station.

I. D., at para. 40 (footnote omitted). For the following reasons, we cannot affirm the ALJ's refusal to award "integration" credit to Younts.

4. Putting aside the procedural point that no misrepresentation or lack of candor issue was added or tried against Younts, *compare Silver Star Communications-Albany, Inc.*, 3 FCC Rcd 6342, 6349-6350 (Rev. Bd. 1988) (Board, citing *West Coast Media, Inc. v. FCC*, 695 F.2d 617 (D.C. Cir. 1982), declines to find intentional misrepresentation *sans* issue) [2] *with WCVQ, Inc.*, FCC 90-224, released June 26, 1990 ("the truthfulness and candor of an applicant's testimony are always at issue in Commission proceedings," citing *William M. Rogers*, 92 FCC 2d 187, 199 (1982)), [3] we find, first, that the ALJ's adverse conclusions are not supported by substantial record evidence; and, second, that nothing in Younts' testimony would in any event undermine her personal credentials or her pledge to integrate full-time into the management of her proposed station. Whereas we yield great deference to the credibility findings of an ALJ, *see, e.g., TeleSTAR, Inc.*, 2 FCC Rcd 5, 12-13 (Rev. Bd. 1987) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951)), [4] and shall not disturb such findings if supported by substantial evidence, *WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1141 (D.C. Cir. 1985), a reviewing body must also make a "fair estimate of the worth of the testimony of witnesses" and must not become "an instrument of futile casuistry" --a useless tool for merely "rubber stamping" ALJ findings. *Universal Camera*, 340 U.S. at 489-490 (Frankfurter, J). *See also FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 364 (1955) (rejecting Court of Appeals determination that ALJ demeanor findings not to be disturbed unless "clearly erroneous"). As in *Fox River Broadcasting, Inc.*, 88 FCC 2d 1132 (Rev. Bd.

1982), *aff'd* , 93 FCC 2d 127 (1983), we eradicate the ALJ's stamp of "liar" from this applicant and credit fully the "integration" proposal denied below.

5. Ignoring almost completely the *contretemps* over Younts' age (she initially claimed to be 67 but was 70), *I. D.*, paras. 42-45, as without probative value as to her intention to fulfill her "integration" pledge, [5] we move to the ALJ's assertions as to "her past employment history and her present status as a retired person." *Id.*, at para. 40. The record reflects that Younts (and her husband) were the licensees of WEEB-AM, Southern Pines from 1947-1981. [6] (WEEB-AM is now licensed to RBG, which has recently filed for bankruptcy under Chapter 11, about which more *infra* para. 22.) For some time (apparently in the 1960's), the Younts also owned WUSM-AM, Havelock, North Carolina, of which Mrs. Younts was Vice President. After selling WEEB in 1981, the Younts, while maintaining a residence in Southern Pines, shuttled (1984-1985) back and forth between North Carolina and Florida, thinking to retire to the latter. However, that commute ceased between September 1985 and March 1986, when the Younts were compelled to devote full-time again in Southern Pines to WEEB-AM, since the buyer had stopped making payments, thus cutting off that portion of the Younts' retirement income.

6. At *I.D.*, para. 46, there is reflected a to-do over the fact that, although Younts said she was "retired" in her deposition, she responded at hearing that she was "semi-retired" (Tr. 320-329). She explained that what she meant was that she was "temporarily retired" (or "not exactly retired"), because "I intend to go back to work again" (Tr. 323). The ALJ characterized her testimony as "evasive," *I.D.*, para. 40, but we have reviewed the entire transcript and find, at worst, a semantic quibble not indicative of attempted deception, and certainly nothing in her testimony on this point would bring into question her *present* "integration" pledge.

7. Similarly, at *I.D.*, paras. 47-48, the ALJ found Younts "evasive" about her past broadcast experience. Asserting that Younts claimed at hearing to have worked "full-time" at WEEB-AM, the ALJ believed that her deposition indicated that she had worked only "part-time" at WEEB, and that she later "changed her testimony" to say that she had worked only "part-time" at WEEB and at WUSM. However, we have thoroughly reviewed the transcript and agree with Younts that the ALJ "strung together four statements of Mrs. Younts to four separate and different questions, each dealing with a different period of time, and treated these statements as if each described an identical set of facts." [7] Rather, Younts asserts, and the record transcript confirms (*see* Tr. 329-345), that she said that she had worked full-time on the affairs of the two stations which she and her husband owned from 1947 to 1981, and then again later at WEEB; that for part of her career she split her attention between WEEB and WUSM; that she sometimes did station financial work at the office in her home; and that she did so in an executive capacity. [8] Moreover, in para. 48 of the *I.D.*, the ALJ claimed that Younts "admitted she had not worked 40 hours a week at any business since 1947," because of her civic activities. But the *actual* question (and her answer) on which the ALJ's assertion was apparently based, is as follows (Tr. 346; emphasis added):

> Q. All right, *and after April of 1986*, going back, it's true, is it not, that you have not worked 40 hours or more per week, on site, at any business, since 1947, isn't it?
>
> A. No, I have not worked 40 hours, because I have not been employed. I have been doing volunteer work and had a lot of civic duties to attend to.

Younts never asserted that she worked full-time after 1986; nor did she ever suggest that she hadn't worked full-time while she and her husband owned the two stations, because of civic activities or for any other reason. The record on her broadcast experience is clear and uncontroverted by the other parties.

8. We next address the exception to the ALJ's findings regarding Younts' claim to have been a resident of Southern Pines since 1947. Noting that, in May of 1984, the Younts obtained Florida drivers' licenses and voting registrations, items they did not convert back to North Carolina until 1988, the ALJ found Younts' testimony "evasive and less than candid" on the issue of the duration of her local residence. But we have reviewed the record and agree with Younts that [9]:

> Once more, however, the Presiding Judge has turned a number of innocuous and consistent statements into purported intentional misrepresentation. Again, in fact, the core factual issue is undisputed: Mrs. Younts has at all times since 1947 maintained a residence in Southern Pines, North Carolina at which she has spent a substantial portion of her time. The evidence concerning her contacts with the state of Florida does not undercut this fact. That evidence shows only that Mrs. Younts temporarily changed her state of voter registration and driver's license to Florida. Mrs. Younts explained at hearing that between 1984 and 1985, she and her husband were looking to buy a condominium in Florida, and that they stayed at the home of friends, for two to three weeks at a time, when they were there. Tr. 355. The Younts' shuttled back and forth between North Carolina and Florida frequently during that period, spending approximately half their time in each state. Tr. 357. If anything, Mrs. Younts spent more time in Southern Pines than in Florida. While she said she divided her time half and half while she was travelling back and forth, she also testified that she suspended the trips to Florida altogether between September of 1985 and March of 1986 when she and her husband had to spend full time in Southern Pines running WEEB(AM), the radio station they had sold in 1981, and had to repossess.

Younts consistently testified that, because of her husband's failing health (he died shortly thereafter), they spent considerable time in Florida (at the home of a lawyer friend) after their 1981 sale of WEEB; that they had planned to purchase a condominium and move completely to that state, but their plans were scotched in September 1985 when the WEEB deal went sour, and they returned in earnest to their Southern Pines residence. Neither the record nor the other parties contradict Younts' depiction in the slightest, nor does anything challenge her claim to have otherwise maintained and used her Southern Pines residence continuously since 1947. [10]

9. At *I.D.*, para. 52, the ALJ also found that "Younts' testimony about the past and possible future involvement of her children in her application and her proposed station was equally evasive and less than candid," particularly that respecting her son Millard Younts, a Washington, D.C. media broker, *see id.*, paras. 52-53. But we have reviewed the record on this matter in its totality and find no intent to deceive whatever. The questions put to Younts sought to adduce whether her son had acted in an "advisory capacity," either to her or her husband, with respect to the instant FM application; and her responses -- while occasionally captious -- avowed that although she had had cursory discussions with her son about the application, his advice has been chiefly to make her own decisions. Nowhere on the record is there the slightest evidence that Younts, whose own involvement in broadcasting spans five decades, was not relating the absolute truth in this regard. The ALJ did not add (or even hint at) a real-party-in-interest issue against Younts, nor do her opponents proffer a scintilla of evidence to suggest that the son has an undisclosed equity interest in the applicant. *Compare Rayne Broadcasting Co., Inc.*, 5 FCC Rcd 3350 (Rev. Bd. 1990) (real-party-in-interest issue added based upon significant family member involvement, but where we nonetheless observed that "it is not unnatural for family members to assist each other without expectation of personal profit," *id.*, at 3352), nor is any such routine family assistance, standing alone, legally profound. *See Llerandi v. FCC*, 863 F.2d 79, 86 (D.C. Cir. 1988). Suffice it that nothing on this record proves an intent on the part of Younts to deceive about her son's role, however sharp some of her replies.

10. Finally, we come to the exchanges over whether Younts' husband would have "integrated" full-time into the station, had he lived. *See I. D.*, paras. 54-58. The parties seem to have believed that the question of Younts' "integration" credit somehow pivoted on her husband's tentative intentions prior to his death, in light (we suppose) of the *HDO* caveat that Younts "will not be allowed to improve its comparative position" by the (*post* "B" cut-off) substitution of the surviving spouse. Whereas we find the apparent premise for the entire line of questioning to be generally erroneous, we have found the transcript on this point to be consistent that (1) Younts could not speak with absolute certainty about her husband's final intentions, but (2) she had discussed the matter with him (without great detail) and "felt" confident he would have ultimately proposed full-time "integration." However, we consider legally irrelevant the unproductive conjecture over what Jack Younts' undeclared intentions might have been when he filed his application (or at any time before his death). Under applicable Commission policy, an applicant need not have indicated an "integration" commitment until *after* hearing designation and at the exhibit exchange date. *Northland Communications*, 100 FCC 2d 914, 915-918 (Rev. Bd. 1985), *rev. denied*, 60 RR 2d 776 (1986). [11] Thus, Jack Younts (had he lived) would not have had to unequivocally decide whether to "integrate" until the exhibit exchange date here, and his intentions until that deadline, however likely, are legally immaterial. Suffice it that, at the exhibit exchange date, Younts proposed full-time "integration," there was no record variance from Younts' original application, *compare Sarasota - Charlotte Broadcasting Corp.*, FCC 90R-53, released June 27, 1990, at paras. 5-9 ("integration" proposal at variance with *application itself* rejected); *Anchor Broadcasting, supra* note 10, 5 FCC Rcd at 2438-2439 (expressly contingent "integration" pledge rejected), and it is idle to speculate on what the late Jack Younts had in mind prior to the exhibit exchange date. Younts, therefore, has not "upgraded," and her testimony on her husband's intentions, read on the whole and in context, reflects we think her fair and best effort, particularly considering her candid qualification that she could *not* speak with certainty as to her husband's *ante mortem* state of mind. Once more we see no deliberate deception.

11. As we have said many times, the Board is enjoined to defer to the credibility findings of an ALJ, *TeleSTAR, supra*, and it does so on an everyday basis where substantial evidence supports those findings, as witness a small sampling of our very recent cases, *e.g.*, *Rebecca L. Boedker*, 5 FCC Rcd 2855, 2855-2860 (Rev. Bd. 1990); *Cannon Communications Corp.*, 5 FCC Rcd 2695, 2700, 2703 (Rev. Bd. 1990); *Advanced Broadcast Technologies, Inc.*, 5 FCC Rcd 1960, 1960-1964 (Rev. Bd. 1990); *Adlai E. Stevenson IV*, 5 FCC Rcd 1588, 1589 (Rev. Bd. 1990); *Tri - State Broadcasting Co., Inc.*, 5 FCC Rcd 1156, 1169-1173 (Rev. Bd. 1990), *recon. denied*, FCC 90R-47, released June 18, 1990. [12] On rare occasions, however, as in *Fox River, supra*, it is determined that merely because an applicant's testimony (and deposition) phrases "were not always *in haec verba*, " or that friction suffused exchanges between the applicant and the ALJ, or for other reasons, the applicant has not exhibited any serious lack of candor. *See id.*, 88 FCC 2d at 1138-1142. *See also Broadcast Associates of Colorado*, 104 FCC 2d 16 (1986) (on review, Comm'n restores "integration" credit of applicant found by Board to have dissembled at hearing); *Metro Broadcasting, Inc.*, 99 FCC 2d 688, 690-696 (Rev. Bd. 1984) (Board overrides ALJ credibility findings), *review denied*, FCC 85-558, released October 18, 1985 (subsequent history omitted, but ultimately *aff'd on other grounds, see supra* note 1). We hold that to be the case here, since nothing on this record casts doubt upon the truthfulness of any comparative claim made by Younts; and unlike *Anchor Broadcasting, supra*, for example, the instant exceptors point to nothing on the record which would raise a conflict with her pledge to "integrate" full-time into the management of her wholly-owned station. Consequently, we credit Younts with a 100% quantitative "integration" factor, augmented by long-time local residence, significant civic activities, [13] and long-time broadcast experience at an executive level, *see Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395-396 (1965) (1965 Policy Statement), unencumbered by any additional mass media interests (*see id.*, at 394-395).

12. We do not, however, enhance Younts' "integration" proposal with a gender preference. Though we recognize that the Commission's gender preference policy is premised on a view that female ownership will increase broadcasting diversity, *Horne Industries, Inc.*, 98 FCC 2d 601 (1984), [14] we must simultaneously confront the equally strong policy that an applicant may not improve its comparative profile after the "B" cut-off deadline, *Daytona Broadcasting Co., Inc.*, 97 FCC 2d 212, 214-217 (Rev. Bd. 1984) (subsequent history omitted), which latter policy is underscored here by the HDO caveat that Younts could succeed to her late spouse's ownership interest, but the applicant could not improve its comparative profile *vis a vis* its competitors (*see supra*, para. 3). It could only, from a comparative perspective, retain the *status quo*. At the "B" cut-off date here, and although

nothing estopped the married Younts from initially proposing substantial female ownership, Jack Younts was the applicant's sole proprietor. Hence, our two competing applicants had no timely notice that they would be competing with Mrs. Younts (or a 100% female enhancement). Consistent with *Daytona Broadcasting* policy, and even more directly the *HDO*, no gender enhancement shall be awarded to Younts.

RICHARDSON BROADCASTING GROUP

13. RBG is a North Carolina limited partnership formed in 1986 to purchase WEEB-AM, Southern Pines (previously owned by the Younts), a station which RBG has timely pledged to divest if awarded the subject FM permit. *I.D.*, para. 10. RBG consists of (1) a solitary "general" partner, Lawrence E. Richardson (with 8.85% of the aggregate partnership equity) and (2) eighteen individual "limited" partners (each holding fractional equity interests ranging from 15.18% on down to 3.55%). *Id.*, paras. 5-6. After having rejected Younts' "integration" proposal, the ALJ found RBG superior to the third competitor, GBI, on a balance of the standard comparative criteria (namely, local residence, civic activities, broadcast experience, comparative coverage), *see id., Concls.*, paras. 24-26, but he awarded the permit nonetheless to GBI after bestowing upon it a "decisional preference" over RBG on a self-styled "Criterion 2: Environmental Impact." *See id., Concls.*, paras. 8-27. Adding to RBG's problems, both Younts and GBI filed, on January 23, 1990, motions to enlarge the issues and remand for hearing on, *inter alia*, RBG's financial qualifications and its transmitter site availability, based upon circumstances leading to the fact that RBG filed under Chapter 11 of the Bankruptcy Code on February 15, 1990. While we find that Younts would prevail over RBG on the standard comparative criteria even if we resolved these several matters in RBG's favor, we will address them because of the (potential) closeness of the competition otherwise, and to give guidance on the novel issue raised.

14. *Environmental Impact.* Because RBG proposed to mount its FM antenna on the existing tower of (its currently owned) WEEB-AM, the Mass Media Bureau found that the cumulative RF radiation from the AM and FM operations at the same site "may significantly exceed the radiofrequency (RF) radiation guidelines under 47 CFR § 1.1307(b)." *HDO*, 3 FCC Rcd at 5454. Thus, an issue was added as follows (*id.*) [15]:

> 1. If a final environmental impact statement is issued with respect to RBG, in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by Sections 1.1301-1319 of the Commission's Rules.

However, in response to that issue, and other *HDO* language requiring RBG to submit an "Environmental Assessment" to the Mass Media Bureau pursuant to §§ 1.1308, 1.1311 of the Commission's environmental rules (*see supra* note 15), RBG submitted on October 13, 1988 an amendment proposing to build a fence around its transmitter site. By *Memorandum Opinion and Order*, FCC 88M-3646, released October 31, 1988, the ALJ accepted RBG's amendment; and, by transmission of January 31, 1989, the Chief, Audio Services Division, Mass Media Bureau, filed a letter with the ALJ which stated (Tr. 63-64):

> The Chief, Audio Services Division, has received a petition for leave to amend submitted by [RBG]. This pleading, submitted pursuant to 47 C.F.R. § 73.3522(b), addresses the contingent environmental issue specified in the Hearing Designation Order.
>
> Upon examination of the enclosed pleading, the Bureau finds that there will be no adverse environmental impact if the measures to protect humans from nonionizing radiation are carried out as proposed. To ensure that result, the Bureau requests that a grant of construction permit or other authorization be subject to the following condition:
>
> > Before the program test authority is authorized by the Commission a fence must be erected at such distances and in such a manner as to prevent the exposure of humans to radiofrequency radiation in excess of the American National Standards Institute guidelines (OST Bulletin No. 65, October 1985). The fence must be of a type which will preclude casual or inadvertent access, and must include warning signs at appropriate intervals which describe the nature of the hazard. Permittee shall submit documentation of Compliance with the special operating condition along with the Form 302, application for license, and the request for PROGRAM TEST AUTHORITY.
>
> Upon acceptance of the above condition, the Bureau requests that the contingent environmental issue specified as to this applicant be eliminated from the Hearing Designation Order.

By *Memorandum Opinion and Order*, FCC 89M-382, released February 6, 1989, the ALJ granted the foregoing request and deleted the environmental issue specified against RBG in the *HDO*.

15. Despite having deleted the environmental issue designated against RBG, the ALJ ultimately charged it with a "decisional" comparative handicap, because of expert testimony "that RBG's proposed operation would exceed ANSI's (and the Commission's) radiation standards within a four meter area near the base of its proposed tower." *I.D.* at para. 29. [16] As to RBG's offer to construct a fence, the ALJ opined (*id.*, at para. 30):

> RBG proposes to address its RF radiation emission problem by building a wooden fence around the tower in that area. But there is already a wooden fence around the existing RBG tower, and it has not been able to keep people away from the tower, and the building that houses the tuning equipment. (*See* RBG Ex. 5; Tr. 282-283, 294, 304-305). Moreover, both experts agree that construction of a fence wouldn't diminish the radiation or eliminate the contaminated area (Tr. 182-183). The contamination

> would occur in an area that will be occupied by people. WEEB(AM) employees are in and around the base of the tower daily. (Tr. 132, 171, 284-285).

16. Even after having deleted the environmental issue against RBG, the ALJ believed that he retained jurisdiction to consider the environmental impact of its proposal on a "comparative" basis (*i.e.*, compared to the routine 1965 *Policy Statement* proposals of the other applicants) under the broad language of the Commission's *Environmental Rules*, 60 RR 2d 13, 16 (1986), where it declared:

> For licensing purposes, environmental factors may be deemed qualifying and/or comparative issues, and will be evaluated with any other factors that are relevant to determining whether grant of an application is in the public interest . . . In a hearing context, the Administrative Law Judge will evaluate and give due weight to the environmental and nonenvironmental public interest factors in rendering his or her determination.

See also id., at 20, where the Commission concluded:

> In addition, environmental issues will henceforth be integrated with nonenvironmental issues and will be heard and decided together by the Administrative Law Judge in a hearing context, and by the Commission in a non-hearing context . . . .

Believing that the preceding language conferred pendent jurisdiction to weigh environmental matters, irrespective of the deletion of a designated hearing issue, the ALJ downgraded RBG (to the point of comparative elimination), because he found radiation in excess of ANSI standards *within* the fenced-off area. *I.D.*, para. 32. The ALJ therefore found that "RBG proposes a hazardous operation that would pose a serious threat to people's health. There is simply no need to grant a hazardous RF radiation operation if there is a safe one around that can be granted," *id.* ; and he ultimately declaimed that (*id.*, *Concls.* at para. 23; internal citations and footnote omitted; emphasis in original):

> The environmental impact problem in this case is not one of aesthetics. We're not concerned with a wild-life preserve or rare flowers in a flood plain. . . Our environmental problem here involves *human life* and *safety*.

17. RBG and the Commission's Mass Media Bureau except to the ALJ's assessment of a comparative environmental demerit against that applicant. RBG asserts that the environmental issue was a "contingent" one, formally deleted by the ALJ at the request of the Bureau's Audio Services Division. The Bureau urges that any "comparative" analysis of environmental matters conflicts with the Commission's *Character Policy Statement*, 102 FCC 2d 1179 (1986) (subsequent history omitted), which in other respects discontinues the prior practice of assessing non-disqualifying "demerits" for misconduct. *See Broadcast Associates of Colorado, supra*, 104 FCC 2d at 18 n.5.

18. The precise dispute before us was rehearsed once before in *Richard L. Oberdorfer*, 2 FCC Rcd 4464 (Rev. Bd. 1987), where the identical facts were visited upon this same ALJ. There an identically-worded environmental issue was designated against an applicant in the *HDO*, the Audio Services Division sent the ALJ an identical letter requesting that any grant to the affected applicant be conditioned on the erection of a fence around its transmitter site, the ALJ there also deleted the issue, but (citing the identical language of the 1986 *Environmental Rules)* declared his intent to nevertheless penalize that applicant with a dispositive comparative demerit. Because that ruling presented a case of first impression, we specifically requested the Mass Media Bureau to comment on the language of the *Environmental Rules* relied upon by the ALJ, and to clarify its processing of applications raising environmental concerns, but the case settled out before the environmental dispute was quelled. [17] We shall therefore address the exceptions in this case, so as to expound the Board's perception of the state of the law and provide guidance to the ALJs, the bar, and the public.

19. Initially, we reject outright the Bureau's thesis that the *Character Policy Statement* somehow modified the language of the 1986 *Environmental Rules* regarding "comparative" consideration of environmental factors in licensing matters. While we agree that the *Character Policy Statement* surely encompasses violations of the Communications Act and FCC rules (a proposition with which the Bureau itself did not always concur [18]), we find that *Statement* wholly inapposite to the circumstances before us. In the context of our situation, and assuming that an applicant complies with a Bureau directive to file an "Environmental Assessment" pursuant to §§ 1.1306, 1.1307 (which RBG has here done), there has occurred no "violation" of the rules. Perforce, where the Bureau has reviewed an applicant's "Environmental Assessment" pursuant to § 1.1308, and accepts the applicant's proposal to ameliorate any Bureau environmental concerns (which the Bureau has here done), there has occurred no "violation" of the rules. Indeed:

> Even where a proposed action will have a significant effect upon the environment, the action may be authorized if the Commission concludes that the public benefits outweigh the environmental consequences.

Environmental Rules, 60 RR 2d at 16 n.12; *see also I.D.*, n. 25. [19] In light of the fact that the Bureau has identified no "violation" of the rules or other misconduct, we hold that the *Character Policy Statement* has no relevance to the language of the *Environmental Rules* suggesting a possible "comparative" consideration of environmental matters. [20]

20. Instead, we agree with RBG that the ALJ's consideration of the environmental matter, once he had deleted the designated issue, was *ultra vires*. To better appreciate our accord, we reprint from RBG's exceptions its concise and well-drafted synopsis which explains [21]:

> The Commission's Rules unequivocally set forth the following chronological sequence for environmental processing: (1) applicants not categorically excluded (*i.e.*, applicants which *may* significantly effect the environment) submit an Environmental Assessment, 47 C.F.R. §§ 1.1306-1307; (2) the staff of the relevant Bureau reviews the Environmental Assessment (EA) to determine whether the proposal *will*

have a significant effect on the environment, 47 C.F.R. § 1.1308, (a) if not, it makes a finding of no significant impact and the application is processed without further documentation of environmental effect, 47 C.F.R. § 1.1308(d), and (b) if so, it informs the applicant who then has an opportunity to amend to reduce or eliminate the problem, 47 C.F.R. § 1.1308(c); (3) if the problem is not eliminated, the Bureau prepares a Draft Environmental Impact Statement (DEIS) and, after comment, a Final Environmental Impact Statement (FEIS), 47 C.F.R. §§ 1.1314-1315; and (4) the Final Environmental Impact Statement (FEIS), if issued, is considered by the ALJ, Review Board, and Commission in hearings, and by the Commission in non-hearing matters, in making a decision based upon both environmental and non-environmental issues, 47 C.F.R. § 1.1319. The clear intent of the rules is that environmental issues will only be considered in the decision-making process along with non-environmental issues *after* a Final Environmental Impact Statement (FEIS) is issued. [3]

[3] In fact, final action with respect to applications subject to Environmental Impact Statements may not be taken until thirty and ninety days, respectively, after Notice of Availability of the DEIS and of the FEIS is published in the *Federal Register*. 47 C.F.R. § 1.1314(h). It is for this reason obviously that the *HDO* provided that "the comparative phase of the case will be allowed to begin before the environmental phase is completed." *HDO*, p. 2.

21. Our *HDO* here contemplated the trying of the environmental issue "*[i]f a final environmental impact statement is issued with respect to RBG . . . .*" *See supra* para. 14. But after reviewing RBG's "Environmental Assessment," and acquiescing in its fence proposal, the Bureau apparently found it unnecessary to issue even a "Draft Environmental Impact Statement" let alone the "Final Environmental Impact Statement" contemplated as a catalyst in the *HDO*. Under the Bureau's processing procedures as we now better apprehend them, the environmental issue designated here was purely contingent: since the explicit contingency never arose, no further adjudicatory consideration was appropriate, especially after the ALJ deleted the entire issue. *See Cardwell Broadcasting*, FCC 90R-70, adopted July 25, 1990. [22] In view of all of the foregoing, RBG should not have been downgraded comparatively as against its competitors on environmental grounds. While, as indicated in *Richard L. Oberdorfer*, we appreciate that the 1986 *Environmental Rules* created an ambiguity insofar as it stated that environmental factors may be heard on a "comparative" basis and that "environmental issues will henceforth be integrated with nonenvironmental issues and will be heard and decided together by the Administrative Law Judge in a hearing context," [23] we believe that language does not appertain where the issue is designated on a "contingent" basis, but later deleted because the applicant has amended to satisfy the Bureau's stated environmental concerns. [24]

22. *Motions to Enlarge Issues.* On January 23, 1990, both Younts and GBI filed motions to add financial (and associated reporting, transmitter site and candor/misrepresentation) issues against RBG. The pleadings were based on a Legal Notice published on January 8, 1990 in *The Southern Pines Pilot* announcing that North Carolina National Bank (NCNB), RBG's designated lender for the instant FM permit, had foreclosed on the assets of RBG for non-payment on loans of $196,454.50 it had borrowed from NCNB in connection with WEEB-AM. [25] The Legal Notice also announced the bank's intent to sell at public auction the land pledged by RBG to secure the loan(s), upon which land is situated the WEEB tower where RBG has proposed to mount its FM antenna (a dual mounting that initially raised the contingent environmental issue). Younts also invoked the "Lender's Affidavit" of NCNB Vice President, James L. Armfield, that accompanied the foreclosure proceeding and that averred [26]:

> [RBG has] defaulted on said loan in that, among other things, [it has] failed to pay the required monthly or other required installments of principal and interest pursuant to the terms and conditions of the aforesaid Note and Deed of Trust continuing through the date of this Affidavit [December 5, 1989]. The first note required principal payments commencing *March 1, 1989* and none have been received.

23. Based on these developments, RBG's opponents seek the addition of a financial issue against it. They also seek a transmitter site issue and a reporting issue for RBG's alleged failure to disclose the imminent loss of its transmitter site to bank foreclosure. And they seek a lack of candor/mispresentation issue against RBG for the failure of RBG's principal, Lawrence Richardson, to disclose at the March 20-21, 1989 hearing that he was in default on an NCNB loan, particularly since Richardson there "testified specifically that RBG at that time was paying its creditors as its bills became due." [27] Finally, Younts maintains that RBG's "integration" factor must be reexamined, because its limited partnership agreement expressly permits removal of Richardson as RBG's "general" partner if he "is subject to bankruptcy proceedings." [28]

24. On February 20, 1990, RBG filed an opposition to the two enlargement motions, contending (1) that "RBG was forced to seek Chapter 11 protection under the bankruptcy laws on the morning of February 15, 1990 to block the foreclosure . . . As a result, the foreclosure never took place," so that consequently "RBG continues to *own* its transmitter site, and thus, has far more than the typical 'reasonable assurance' of the availability of a site that the Commission requires [29]; (2) that although the bank had sent a "demand letter (requiring payment of the *entire* $194,454.50 owed on the loan)" in August 1989, and that "foreclosure proceedings were technically initiated in December 1989," RBG had been working with NCNB until February 15, 1990 to restructure the debt [30]; and (3) that to the extent that NCNB's foreclosure cast doubt upon the bank's 1987 letter regarding the financing of RBG's proposed FM station, it has lately secured the commitment of First Bank, Pinehurst, North Carolina to lend it $200 thousand for the FM station, and that RBG's "limited" partners have agreed to personally finance the FM. On May 10, 1990, RBG supplemented its opposition with a pleading asserting (1) that it remained in Chapter 11 reorganization; (2) that NCNB continued to be willing to loan RBG money for the FM, if the loan were fully guaranteed and collateralized by RBG's "limited" partners (who are also allegedly willing to step in if NCNB declines the loan); and (3) that Richardson's March 1989 hearing testimony that RBG was not in arrears on certain

debts was "an error." [31] Younts and GBI reply that RBG has again misrepresented its financial picture in that NCNB plainly advised RBG in August 1989 of its intent to foreclose, that there were no serious loan restructuring negotiations between RBG and NCNB, that RBG has long been in arrears to Broadcast Music, Inc. (BMI) also, and that as late as March 21, 1990 RBG's bankruptcy counsel withdrew because Richardson's checks were returned by the bank for insufficient funds.

25. *Discussion.* Though the contemporaneous bankruptcy of a co-owned station is not necessarily fatal to the "reasonable assurance" financial claims of an applicant with respect to a new and different station, *see generally Omaha TV 15, Inc.*, 102 FCC 2d 875, 886-887 (Rev. Bd. 1985), *modified on other grounds*, 4 FCC Rcd 730 (1988), [32] the enlargement motions before us raise many very troubling questions as to whether RBG (and Lawrence Richardson) have met the Commission's demanding standards of punctilio as to its progressively deteriorating financial condition (particularly as it might have affected RBG's claimed transmitter site). *See generally Washington's Christian TV Outreach, Inc.*, 99 FCC 2d 395, 397-401 (Rev. Bd. 1984) (subsequent history omitted). But we need not decide definitively whether a remand is necessary on the requested issues, because RBG could not prevail over Younts on standard comparative grounds, even if we ignored RBG's financial (and associated) problems. [33] Whereas Younts has been a resident of Southern Pines for more than four decades, with civic activities in that very community of license, and high level broadcast experience of approximately that duration, RBG's Richardson has lived (and participated in civic activities) in the proposed service area, but has not resided in Southern Pines since 1978, and his broadcast experience is less extensive than Younts'. *See I. D.*, paras. 33-39; *Concls.*, para. 15. Younts' long-time Southern Pines residence and civic activities outweigh those qualities of RBG's Richardson, *see West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985), as does her broadcast experience. Under the 1965 *Policy Statement*, Younts defeats RBG.

GREENE BROADCASTING, INC.

26. GBI portrays itself as a two-stock-class corporation, with Dwayne Greene holding all of the Class A voting stock (representing 36% of the aggregate corporate equity), and with the Class B non-voting stock split between J.D. Longfellow (24% of the aggregate corporate equity) and Judith Harte (40% of the aggregate corporate equity). *I. D.*, paras. 8-9. Extrapolating Greene's 36% equity interest to an effective 100% factor (sole voting stockholder will "integrate" as station general manager), *see Victory Media, Inc.*, 3 FCC Rcd 2073 (1988), the ALJ also augmented GBI's "integration" credit for Greene's pledge to move to Southern Pines, his brief broadcast experience (15 months in broadcast sales), as enhanced for minority status, *see I.D.*, paras. 61-65, and he rejected the complaints that GBI's "limited" partner(s) had been (and would be) active in station management. *See id.*, paras. 66-73. As indicated previously, the ALJ found GBI "decisionally" superior to RBG on "environmental" grounds; and having rejected completely Younts' "integration" proposal, the ALJ never otherwise compared RBG and Younts on the standard comparative criteria. *Id., Concls.*, para. 22. He awarded GBI the permit.

27. *Integration.* Both Younts and RBG except to the award of a 100% (extrapolated) "integration" factor, claiming that non-voting stockholder Longfellow, an active broadcasting entrepreneur who lived and worked in Southern Pines in 1984 and 1985 and will reside near the proposed station, is clearly a controlling principal of RBG. More specifically, the exceptors charge that Longfellow (who has numerous other media interests that would be attributable to RBG if he were here regarded as an active principal here [34]): (1) initiated the application; (2) prepared GBI's Articles of Incorporation (which were not amended to provide for two classes of stock until after the "B" cut-off), and which Articles listed Longfellow's business address as GBI's; (3) contacted and retained GBI's engineer; (4) acquired what was alleged to be "reasonable assurance" of GBI's original transmitter site; (5) suggested (and actually retained) his own communications attorney for GBI; (6) assisted in securing potential bank financing, but will finance half if a bank loan fails (and Longfellow believes the other "limited" partner Harte will do so as well); (7) loaned the money to Greene to meet his capital calls and the $6 thousand FCC filing fee; and (8) was active in negotiations for GBI's second transmitter site, after the first site became unavailable. [35]

28. Moreover, the exceptors argue that in attempting to camouflage Longfellow's active and pervasive control over GBI, Greene lacked candor in his testimony over many matters (*e.g.*, retention of the engineer, *compare* Tr. 569-570 *with* Tr. 708; retention of counsel, *compare* Tr. 568 *with* Tr. 720-721 and Younts Exh. 4; solicitation of investors, *compare* Tr. 538 *with* Tr. 690, 724-725), as evidenced conclusively by the contradictory testimony of Longfellow. [36] They claim a stark conflict between Greene, Longfellow, and the *actual* facts on the following point [37]:

> It is also totally admitted *Longfellow also* assisted Greene in finding GBI's *second* transmitter site. Tr. 473. Longfellow contacted Mr. and Mrs. Gillis concerning the second transmitter site prior to putting Greene in contact with Mr. [Gillis] and discussed with Mr. Gillis the urgency of finding a new transmitter site. Tr. 474, 507. Although Greene claimed at hearing that Longfellow did not perform any negotiations with Mr. Gillis on behalf of GBI (Tr. 474), and that Longfellow had only met Mr. Gillis by telephone (Tr. 507), and that he did not recall Longfellow participating in drafting the option agreement (Tr. 511), in actuality, *Longfellow personally* met with Mr. Gillis, toured the land, discussed paying Mr. Gillis an option for the land for GBI, and negotiated a $1,000 two-year option fee. Tr. 668. Greene was not at the meeting. Tr. 668. Longfellow then met with Greene, told him that he had made the arrangements for the site and helped draft the letter that was sent to Mr. Gillis. Tr. 669-70. The money for the option was lent by Longfellow to GBI. Tr. 512, 671. Longfellow stated that if he had not involved himself in acquiring a new transmitter site, he was not sure it would have been done in time. Tr. 691.

29. GBI does not deny Longfellow's active involvement in creating the applicant, or many other aspects of application preparation, but contends that "Longfellow's actions are not inconsistent with his commitment to be a passive investor." [38] GBI claims [39]:

> After Longfellow was informed by counsel that he should no longer assist Greene, Longfellow ceased providing assistance to Greene. Tr. 690. After that point, he lent help only in securing a new transmitter site in response, among other things, to a perceived unwillingness of the supplier of GBI's transmitter site to deal with Greene because of his race.

It also accuses the exceptors of stretching the record of alleged inconsistencies between the testimony of Greene and Longfellow.

30. Citing *Victory Media*, the ALJ found Longfellow's active role not to be dispositive of his "passive" status. *I. D.*, paras. 67-69. And, while agreeing with the exceptors that "[c]ertainly there were some evidentiary inconsistencies . . . they are neither significant nor material." *Id.*, at para. 72 (footnote omitted). He further observed that GBI's witnesses "looked the Presiding Officer full in the face; they used natural gestures; and they testified in their own accustomed language," and were therefore credible. *Id.* (*But see Penasquitos Village, Inc.* v. *NLRB*, 565 F.2d 1074, 1084-1085 (9th Cir. 1977)(Duniway, J, dissenting)(unreliability of demeanor findings)).

31. *Discussion.* Again in its *Proposals to Reform the Commission's Comparative Hearing Process* (Gen. Dkt. 90-264), FCC 90-194, released June 26, 1990, the Commission acknowledged the comparative consequences that have evolved from *Anax Broadcasting, Inc.*, 87 FCC 2d 483 (1981), and the difficulties in the treatment of "active/passive ownership structure[s]," *id.* at para. 23, even going so far as to "propose to overturn the [*Anax*] policy and treat all ownership interests equally for purposes of determining the comparative standing of applicants." *Id.*, at para. 22. That was not the first time the Commission recognized the ease with which the *Anax* policy can be manipulated through disingenuous or unlikely two-tier ownership proposals. *See, e.g., Coast TV*, 4 FCC Rcd 1786, 1787 (1989); *Revision of Application for Construction Permit for Commercial Broadcast Stations*, 4 FCC Rcd 3853, 3855-3858 (1989).

32. In the case at bar, GBI does not deny the very active role of non-voting stockholder Longfellow. But, invoking cases such as *Victory Media* and *Susan S. Mulkey*, 4 FCC Rcd 5520 (1989), GBI submits that neither Longfellow's activities nor his provision of most (if not all) of Greene's financial contribution are dispositive of the question of whether Longfellow should be deemed a "passive investor." [40] We do not necessarily disagree with GBI's general reading of those two cases, and concur that the question of whether a principal should be deemed an "active" player, thus -- at minimum -- requiring the attribution of his or her equity share for "integration" purposes, depends in each case on the "totality of the record evidence." *Magdalene Gunden Partnership*, 3 FCC Rcd 7186 (1988). And any lack of *bona fides* in the projection of an ownership structure could be critical. *See, e.g., Carla Corporation*, FCC 90R-49, released June 19, 1990 (and cases cited therein); *see generally KIST Corp.*, 102 FCC 2d 288, 292-293 (1985) (subsequent history omitted).

33. In refining its methodology for assaying whether to credit a two-tier ("active"/"passive") ownership structure, the Commission's reconsideration in *Coast TV*, 5 FCC 2d 2751 (1990), is helpful to the case before us. There it elaborated upon its current presumption that a "passive" principal's movements "in initiating the application and in arranging for its financing" are not dispositive, if these and similar activities occur prior to the formal adoption of the applicant's bi-level ownership structure. [41] Or, put another way:

> Where an applicant adopts an ownership structure under which a particular owner is to be a limited partner (or a non-voting stockholder), that owner's subsequent participation in any aspect of decisionmaking raises a question as to whether he will, in accordance with the applicant's ownership structure, have a passive, rather than an active, role in the management of the ongoing licensee. This is true whether the involvement of the allegedly passive owner is continuing or whether that involvement has ended.

5 FCC Rcd at 2752-2753. It went on to declare (*id.*, at 2753; emphasis added):

> In summary, where an owner has assumed an active role *after* the applicant has declared that that owner will be passive, that owner's equity interest will be attributed to the applicant for integration purposes *regardless of the natureof the "passive" owner's involvement.*

It observed that Coast's "passive" principals there engaged in activities "for at least three weeks after" its organization, and the *Coast TV* Commission attributed their ownership as "active."

34. Here GBI does not deny that Longfellow was actively (and maybe unilaterally) involved in the obviously vital task of locating and negotiating for GBI's second transmitter site, without which asset all other aspects of its application would be academic. *See Goodlettsville Broadcasting Co., Inc.*, FCC 90-267, released July 23, 1990. Hence, it is instructive that the very recently issued *Webster - Fuller Communications Associates*, FCC 90-244, released July 16, 1990, underscored the *Coast TV* language that, where a principal has engaged in *post*-organizational activities, "that owner's equity interest will be attributed to the applicant for integration purposes regardless of the nature of the 'passive' owner's involvement," *Webster - Fuller* at n. 10; and it is also noteworthy that the Commission there found one strong indicator of "active" *post*-organizational status to be (as here) the acquisition of a *new* transmitter site, *see id.*, at n. 9.

35. But, quite as with our discussion of the problems of RBG, we need not determine whether the literal language of the recent *Coast TV* compels the attribution of Longfellow's 24% equity share to GBI for comparative "integration" purposes, [42] or whether the contradictions in the testimony of Greene and Longfellow are actionable in some form. Even if we circled these hurdles, GBI would not prevail over Younts. That is, assuming *arguendo* a

100% quantitative "integration" credit for both, Younts is qualitatively superior: with Younts' local residence offset by Greene's minority status, *Radio Jonesboro, Inc.*, 100 FCC 2d 941, 945 (1985) ("minority ownership and local residence have equal significance"), that still leaves Younts appreciably ahead for local civic participation and superior broadcast experience. These two comparative factors clearly defeat GBI. *See id.*, at 946-948.

CONCLUSIONS

36. Having determined to restore Younts' basic "integration" credit for lack of substantial record evidence that she has engaged in any fatal degree of intentional deceit or otherwise undercut her proposal, *see Broadcast Associates of Colorado; Metro Broadcasting; Fox River,* Younts prevails under the 1965 *Policy Statement* criteria. But because this could be a relatively close case if all three remaining applicants were ceded a 100% "integration" credit, we have addressed at length the primary exceptions of all of the parties so as to illuminate the record and the law for any reviewing authority. We have not finally resolved the exceptions going to GBI's "integration" proposal or the motions to remand for evidence surrounding RBG's recent bankruptcy, but believe both circumstances raise serious questions that would need formal disposition before either applicant could receive this permit over Younts. As it is, we need not do so now, since even deciding these matters most favorably to GBI and RBG would not place them in a position to prevail over Younts under the standard comparative issue. [43]

37. ACCORDINGLY, IT IS ORDERED, That the unopposed petitions for leave to amend filed by Richardson Broadcasting Group on March 27, 1990 and by Greene Broadcasting, Inc. on March 1 and April 24, 1990, respectively, ARE GRANTED, and the amendments ARE ACCEPTED;

38. IT IS FURTHER ORDERED, That the petition for leave to amend filed on February 12, 1990 by Richardson Broadcasting Group IS DENIED;

39. IT IS FURTHER ORDERED, That the motions to reopen the record and enlarge issues filed on January 23, 1990 by Elizabeth M. Younts and Greene Broadcasting, Inc., and all associated pleadings, ARE DISMISSED as moot; and

40. IT IS FURTHER ORDERED, That the applications of Richardson Broadcasting Group (File No. BPH-870824MG) and Greene Broadcasting, Inc. (File No. BPH-870824MI) ARE DENIED, and the application of Elizabeth M. Younts (File No. BPH-870824MH) for a construction permit to establish a new FM broadcast station at Southern Pines, North Carolina IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Because, after briefing and oral argument, it appeared that this decision might turn on minority (and/or) gender preferences, the supervising Board Member determined to defer until the issuance of the Supreme Court decision in *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990). As it turns out, such preferences are not dispositive here, at least at the Board level.

[2] Application for Review pending.

[3] Our *Silver Star* decision did take notice of the principle embodied in *William M. Rogers*, *see* 3 FCC Rcd at 6350, and our discussion there intended no more than the Commission has explained to the Court of Appeals when it stated that:

> An applicant may be disqualified for misconduct *without a specific issue* where the misconduct occurs "before the judge's own eyes," [but] such conduct "should be of such blatant and unacceptable dimension that its existence cannot be denied."

Brief for FCC at 45 (citation and footnotes omitted; emphasis added), *LBC, Inc. v. FCC*, 865 F.2d 1329 (D.C. Cir. 1988) (*aff'g mem.*). At the same time, and while the distinction may not always have been apparent, no special "truthfulness" issue has ever been deemed necessary merely to find *not* credible or reliable the ordinary testimony of a witness under another substantive issue, a quotidian occurrence. *See, e.g., Adlai E. Stevenson IV*, 5 FCC Rcd 1588, 1589 (Rev. Bd. 1990) (ALJ finding of lack of credibility upheld; no misrepresentation or lack of candor conclusion). In *WCVQ, Inc.*, the Commission remanded for rebuttal an applicant's claims of "integration" fulfillment at another station, but notably it did not "consider[]the merits of the ALJ's ruling concerning the requested misrepresentation or lack of candor issue." *Id.*, at para. 10.

[4] *Aff'd*, 3 FCC Rcd 2860 (1988), *aff'd per judgment TeleSTAR, Inc. v. FCC*, 886 F.2d 492 (D.C. Cir. 1989), *petition for cert. pending*, No. 89-1770.

[5] Even Younts' opponents would not make much of this, *see* Tr. of Oral Arg. at 879 (RBG Counsel); 918-919, 926-927 (GBI Counsel).

[6] *See* Younts Exceptions at 7. The record further reflects that Younts was Secretary/Treasurer of WEEB-AM from 1974-1981, *I.D.*, para. 60, and also served as Vice President of Younts' WUSM-AM, Havelock, N.C., from 1962-1969. *Id.*

[7] Younts Exceptions at 7.

[8] *See also id.* at 7-9.

[9] *Id.*, at 11.

[10] The ALJ speculates, at *I.D.*, para. 50, that the Younts "had moved to Florida" for tax rather than health reasons, because "the Younts didn't file personal income tax returns in North Carolina from 1984 to 1989." *Id.* (footnote omitted). However, just as in the recent *Anchor Broadcasting Limited Partnership*, 5 FCC Rcd 2432, 2434 (Rev. Bd. 1990), where we effectively declined to take action on an allegation that an applicant principal was cheating the District of Columbia by falsely claiming a Virginia "tax residence," we will not attempt to determine whether Yount owes taxes in North Carolina. As the Commission recently reaffirmed in its *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd 3252 (1990), it will not ordinarily adjudicate allegations of non-FCC misconduct, nor take cognizance of unadjudicated claims of violations of laws other than the Communications Act or FCC rules. State law on what constitutes a domicile for tax purposes is a thicket, *see, e.g., In re Dorrance's Estate*, 163 A. 303 (Pa.), *cert. denied*, 287 U.S. 660 (1932), and the Commission has no expertise in

such matters. Should an applicant or licensee be convicted of tax fraud, the Commission will *then* consider the offense. *Policy Regarding Character*. (*But cf. Las Americas Communications, Inc.*, 1 FCC Rcd 786, 789-791 (Rev. Bd. 1986) (Board takes cognizance of *admitted* and willful failures to file or pay federal income tax during pendency of application, despite absence of conviction)).

[11] *Aff'd per judgment sub nom. Up North Broadcasting Co. v. FCC*, 814 F.2d 774 (D.C. Cir. 1987). Under a revised regime established just last year, applicants filing under a new application procedure will not be allowed the latitude of *Northland* and will be compelled to declare any "integration" plans much earlier in the process. *Revision of Application Form (FCC Form 301)*, 4 FCC Rcd 3853, 3860 (1989). The instant applicants filed in 1987, so *Northland* still controls these "integration" deadlines.

[12] Not to the contrary are recent cases such as *Anchor Broadcasting, supra* note 10, or *Carta Corporation*, FCC 90R-49, released June 19, 1990. In neither of those cases did our decision to reject "integration" credit turn directly on a disagreement with the credibility findings of an ALJ; they turned, rather, on the fact that certain applicants there had not, on the record as a whole, carried their evidentiary burden by a preponderance, a burden which under the "standard comparative issue" falls squarely on each and every applicant. *See generally Cuban-American Ltd.*, FCC 90-223, released June 22, 1990, at para. 28. Every disagreement with an ALJ on a reading of the record evidence, in its entirety, does not imply a rejection of credibility findings. *See, e.g., Mid-Ohio Communications, Inc.*, FCC 90-266, released July 23, 1990, at n.9. But, lest there be any doubt, we expressly find in the case at bar that the ALJ's adverse credibility findings are not supported by substantial evidence that Younts willfully intended to deceive about any facet of her application (save shaving her age by 3 years).

[13] At *I.D.*, para. 59, the ALJ observed that Younts "claims credit for some 20 local civic activities"; but in order to preclude comparative "upgrading," a matter discussed more closely in our text, para. 12, he limited such credit to the several activities engaged in by her late husband. We agree with this reckoning. We also limit Younts' broadcast experience preference to her *own*, not her husband's.

[14] The recent Supreme Court decision in *Metro Broadcasting, Inc., supra* note 1, did not address the Commission's female preference, *see* slip op. at 7 n. 7. At one point, the female preference was overturned, but subsequent events mooted that ruling, *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985), *vacated and reh. en banc granted*, Order of October 31, 1985, *remanded*, 806 F.2d 1126 (D.C. Cir. 1986) (table), *mandate recalled*, Order of June 9, 1988, *remanded*, Order of August 15, 1988, and the case ultimately settled at the agency without final judicial resolution. *See James U. Steele*, FCC 90-225, released July 3, 1990. The preference has been attacked again in *Lamprecht v. FCC*, No. 88-1395 (D.C. Cir.), but by legislative mandate yet survives in our adjudications, *see, e.g., William M. Piner*, 5 FCC Rcd 441 (1990).

[15] The *HDO* went on to state:

> Accordingly, the applicant is required to amend its application within 30 days of the date of this Order to demonstrate compliance with the RF radiation guidelines. The applicant must submit a detailed study base[d] upon OST Bulletin No. 65, October 1985, entitled "Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Radiation." This study must include the cumulative effects of the proposed operation and the WEEB(AM) operation. If a fence is to be built, the applicant must give the distance from the base of the tower to the fence. Since the proposal of the applicant may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, the applicant is required to submit the environmental impact information described in 47 C.F.R. § 1.1311. Accordingly, the applicant will be required to file, within 30 days of the release of this *Order*, an environmental assessment with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

[16] "ANSI" is the American National Standards Institute (N.Y., N.Y.), whose radiation exposure levels the Commission relies upon for purposes of its own environmental rules. *See, e.g.*, 47 CFR § 1.1307(b); *see also I.D.*, para. 23.

[17] In later dismissing the pending appeal over the environmental dispute, the *Oberdorfer* Board observed:

> The underlying substantive and procedural questions posed by this appeal, however, remain unanswered. In future cases, clarification of the Mass Media Bureau's procedures with respect to the Commission's environmental rules will serve the public interest.

2 FCC Rcd 5622 (Rev. Bd. 1987).

[18] *See Seven Hills Television Co.*, 2 FCC Rcd 6867, 6874 (Rev. Bd. 1987)(quoting *Character Policy Statement*, 102 FCC 2d at 1209-1210).

[19] There the ALJ stated:

> The Commission has indicated that even though a given environmental problem would have a significant impact, there still might be cases where the public benefits outweigh the environmental consequences. *See Environmental Rules*, 60 RR 2d 13 *supra*, at Footnote 12. This is not the case with the RF radiation contamination problem presented here.

[20] There are, we suppose, applicant actions that could "violate" the environmental rules, in that an applicant might, *e.g.*, fail to file an "Environmental Assessment," or fail to disclose therein environmentally significant information. But that is not the situation here. And assuming applicant compliance with the processing requirements of § 1.1301 *et seq.*, the environmental rules do not seem particularly susceptible of a "violation" within the purport of the *Character Policy Statement*. After award of a license or permit, it may be possible to "violate" directly the environmental rules by, *e.g.*, exceeding the RF levels approved by the Commission or trespassing on an environmentally sensitive area without the FCC's knowledge. But neither is that the case here.

[21] RBG Exceptions at 14-15.

[22] Moreover, as we recently stressed again, where a matter has been fully considered in the *HDO*, and clear instructions given therein, the Board is bound by that instruction. *Empire State Broadcasting Corp.*, 5 FCC Rcd 2999, 3003 (Rev. Bd. 1990) (citing *Frank H. Yemm*, 39 RR 2d 1657, 1659 (1977); *Atlantic Broadcasting Co.*, 5 FCC 2d 717, 721 (1966)).

[23] It seems from the structure of the environmental rules (and as suggested in the reprinted comments of RBG), that "comparative" consideration of an environmental issue might be

appropriate, and within the purview of the pertinent language of the 1986 *Environmental Rules, if and after* the Media Bureau issues any "Final Environmental Impact Statement" identifying a significant environmental impact. But we have never had a case reaching that advanced stage. If the Bureau disagrees with this reading, we enjoin it to clarify matters as we suggested in *Richard L. Oberdorfer (see supra* note 17), for we advise the Bureau that we do not regard the *Character Policy Statement* as relevant to the processing of compliant environmental materials.

[24] We also recognize that the ALJ expressed his concern about the RF radiation exposure of employees working within the fenced-off area, *I.D.*, para. 30, but there is no evidence that any station employee might be so continuously exposed to the anticipated level of radiation that palpable physical danger results.

[25] Younts, however, asserts that RBG has two loans from NCNB: a $150 thousand loan of March 28, 1986, and a $74 thousand loan of November 1, 1988. Younts Motion to Enlarge at 2.

[26] *Id.*, at 3.

[27] *See id.*, citing Tr. 203.

[28] Id., at 7, quoting RBG Exh. 7 at 41. Younts also adverts to RBG Exh. 7 at 36, for the proposition that "[i]n the event of a sale or disposition of substantially all the assets of the [RBG] Partnership . . . the Partnership shall immediately commence to wind up its affairs."

[29] RBG Opposition at 2-3 (emphasis in original).

[30] *Id.*, at 5 (emphasis in original).

[31] RBG Opposition Supplement at 5.

[32] *But cf. Tri-State Communications*, 4 FCC Rcd 8258 (Rev. Bd. 1989) (applicant in bankruptcy at co-owned AM disqualified upon admission of inability to finance FM), *recon. denied*, 5 FCC Rcd 534 (1990) (application for review pending).

[33] For the same reason we need not address the exceptions urging that Richardson lied at hearing about the reasons he left WIOZ-FM, Southern Pines, *see* Younts Exceptions at 33-39, nor the contention that RBG should be awarded no more than 8.85% "integration" credit and assessed a "diversification" demerit because of the media interests of RBG's "limited" partners. *See id.*, at 28-33. These are not decisional, considering Younts' comparative superiority on the face of the two proposals.

[34] At *I.D.*, para. 13, the ALJ reports:

> J. D. Longfellow is: (1) Secretary of Curtis Radio Group, Inc., licensee of stations WMBL-WRHT, Morehead City, North Carolina; (2) Secretary-Treasurer, Director and 12.8% stockholder of Great American Media, Inc., the sole General Partner of Great American Media Ltd. I, licensee of stations WTAB(AM) and WYNA(FM), Tabor City, North Carolina; (3) President, Assistant Secretary, Director, and 15% stockholder of Coastal Plains Media, Inc., licensee of WCPS(AM), Tarboro, North Carolina; (4) President, Treasurer, Director and 100% stockholder of New Age Communications, Inc., the General Partner of New Age Communications Limited Partnership, licensee of WGBR(AM) and WEQR(FM), Goldsboro, North Carolina (Mr. Longfellow is a limited partner with a 14% equity interest); and (5) a .4% stockholder of Osborn Communications Corporation, licensee of WKTC(FM), Tarboro, North Carolina.

GBI "limited" partner Judith Harte also holds several non-attributable media interests, *see id.*, para. 14.

[35] *See* Younts Exceptions at 17-28; RBG Exceptions at 30-40.

[36] *See id., passim.*

[37] RBG Exceptions at 33-34 (emphasis in original). RBG also maintains that GBI's non-voting stockholders retain control over the corporation, because they can elect 2 of its 3 directors. *Id.*, at 39-40. This is an interesting point, which we need not address for reasons explained in text, *infra*.

[38] GBI Reply at 7; *see also id.*, at 9, 11.

[39] *Id.*, at 11-12.

[40] *But cf. Revision of Application Form, supra*, 4 FCC Rcd at 3867 n. 41, where the Commission highlighted some of the characteristics of applications where "integration" credit has been rejected:

> The limited partner contributed 85% of the equity, petitioned the Commission in his own name to have the channel allocated, hired the consulting firm which prepared the application, signed the contracts for equipment and preparation of the application, hired legal counsel, obtained the transmitter site, advised the general partner on all application decisions (which advice was followed in every instance), prepared the financial plan, entered into a bank agreement to provide the financing, and represented the partnership in negotiations with other applicants. *See also Berryville Broadcasting Co.*, 70 FCC 2d 1 (Rev. Bd. 1978) (although integrated general partners claimed an integration credit was warranted, all financing was provided by the third partner; thus, true and actual control rested with that partner); *Payne Communications, Inc.*, 1 FCC Rcd 1052, 1058, 1060 (Rev. Bd. 1986)(integration credit denied where limited partner, *inter alia*, employed a research agency to find general partners with favorable qualitative enhancements for his application); *Pacific Television, Ltd.*, 2 FCC Rcd 1101 (Rev. Bd. 1987), *review denied*, 3 FCC Rcd 1700 (1988) (limited partner provided 99% of the financing and paid for legal counsel who prepared the application and retained engineering consultant); *Religious Broadcasting Network*, 3 FCC Rcd 4085, 4097-98 (Rev. Bd. 1988), *reconsideration granted on other grounds*, 3 FCC Rcd 6216 (Rev. Bd. 1988) (general partners materialized shortly before the application was filed, limited partner held a 90% ownership interest and provided every major element of the application including financing, attorneys and its engineer).

Many of these characteristics also mark GBI.

[41] *But see Proposals to Reform the Commission's Comparative Hearing Process, supra*, FCC 90-194, at para. 23, where as an alternative to the complete abrogation of the *Anax* policy, the Commission has indicated:

> We will also consider whether it would be desirable to create a presumption that a "passive" owner who undertakes the role of forming, financing and initiating the application should be deemed active for purposes of our comparative evaluation and the circumstances in which such a presumption could be rebutted. Such a presumption could modify our holding in *Coast TV*, FCC 90-120, released April 27, 1990.

It would, of course, also reverse the logic of *Victory Media* and *Susan S. Mulkey*. However, the Commission has merely raised the question, and the cited cases are precedent.

[42] Attributing Longfellow's equity share to GBI would reduce its quantitative integration factor to 60% (*i.e.*, Greene's resultant percentage of the "active" ownership equity of GBI). Attribution of Longfellow's equity would also, of course, render his other media interests (*see supra* note 34) countable against GBI, a considerable handicap under the 1965 *Policy Statement*.

[43] None of the three are entitled to a meaningful boost for comparative signal coverage, *see I.D.*, paras. 16-18 (Younts has "very slight" preference over RBG and GBI for overall coverage); and all propose auxiliary power, *id.*, para. 74.

SEPARATE STATEMENT OF BOARD MEMBER ERIC T. ESBENSEN

It is respectfully submitted that the majority's ultimate conclusion that Ms. Younts displayed "no intent to deceive whatever" (*see* text, para. 9) is a much closer question. I am especially troubled by the Younts' obtaining and using Florida driver's licenses and voter's registrations for some four years from 1984 to 1988 (*id.*, para. 8), and the representations they might have made to the State of Florida to obtain same. Additionally, the Younts' maintained these indicia of permanent Florida residence even though they purportedly "returned in earnest" to Southern Pines in September 1985, *id.*, and apparently did nothing further with respect to the State of North Carolina. Of course, the observations in footnote 10, above, are manifestly correct; but, at a minimum, I question whether Ms. Younts has conclusively demonstrated that she has been a permanent resident of Southern Pines "since 1947."

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-494

In the Matter of

Enforcement of Prohibitions
Against Broadcast Indecency in
18 U.S.C. § 1464

REPORT OF THE COMMISSION
(Proceeding Terminated)

Adopted: July 12, 1990; Released: August 6, 1990

By the Commission: Commissioner Quello concurring and issuing a statement.

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I. INTRODUCTION

1. In this report we respond to a remand of the record granted by the U.S. Court of Appeals for the District of Columbia Circuit in *Action for Children's Television v. FCC (ACT II)*. [1] In its remand order, the court directed the Commission to conduct a "full and fair hearing" on the constitutionality of a statutory provision[2] which requires the Commission to prohibit the broadcast of indecent material 24 hours a day. [3] The court granted the remand in light of the Supreme Court's recent decision in *Sable Communications of California, Inc. v. FCC (Sable)*, [4] which held that government may regulate indecent speech if the regulation promotes a "compelling" government interest and is "narrowly tailored" to serve that interest. The Commission accordingly issued a *Notice of Inquiry (NOI)* [5] to solicit public comment on issues relevant to analyzing the validity of the 24-hour indecent broadcasting prohibition in view of the *Sable* decision.[6]

2. After careful consideration of the responses to our inquiry, we conclude that a 24-hour prohibition on indecent broadcasts comports with the constitutional standard the Supreme Court enunciated in *Sable* for the regulation of constitutionally protected speech. First, the Supreme Court has expressly recognized the government's compelling interest in protecting children from broadcast indecency, both to facilitate parental supervision and to promote the well-being of children who may be exposed to indecent material. Moreover, the narrowness with which courts have interpreted "obscenity" has commensurably broadened the range of patently offensive material that could be deemed "indecent" if broadcast, rendering the government interest in protecting children even more compelling. Second, the record in this proceeding reveals that no alternative to a 24-hour prohibition on indecent broadcasts would effectively serve this government interest. The best available evidence indicates that there is a reasonable risk that significant numbers of children ages 17 and under listen to radio and view television at all times of day and night. Neither time channeling nor ratings and warning devices permit effective parental control over these activities, and technologies that may permit control are not currently available. On the other hand, indecent material similar to that broadcast is readily available on other media over which parents can exercise control. Accordingly, we conclude that the compelling government interest in protecting children from indecent broadcasts would not be promoted effectively by any means more narrowly tailored than a 24-hour prohibition.

3. We recognize, however, that there may be instances in which children are not in the broadcast audience at a given time of day in a given market. We therefore have decided to modify our enforcement procedures to permit stations accused of airing indecent material to demonstrate that children in fact are not present in the broadcast audience in their market at the time the alleged indecent program was aired. We believe that, as thus enforced, the 24-hour prohibition against broadcast indecency clearly meets the narrowly tailored criteria applied by the Supreme Court in *Sable*.

II. BACKGROUND

4. This proceeding addresses Section 1464 of the Criminal Code, 18 U.S.C. § 1464 (1988), first enacted by the Radio Act of 1927, reenacted by the Communications Act of 1934, and later codified in the Criminal Code. Throughout this period of more than 60 years, Section 1464 and its identical predecessor provisions have prohibited the broadcast of indecent language. Since 1934, the Commission has been authorized by the Communications Act to enforce Section 1464's provisions by, among other things, assessing forfeitures for its violation.[7]

5. In 1978, the Supreme Court affirmed the Commission's enforcement of Section 1464's prohibition on indecent broadcasting, including the Commission's definition of indecent language.[8] *F.C.C. v. Pacifica Foundation* (*Pacifica*), 438 U.S. 726 (1978); *See also Action for Children's Television v. F.C.C.*, 852 F.2d 1332, 1339 (D.C. Cir. 1988) (*ACT I*). In *Pacifica*, the Court also reaffirmed its holding in *Ginsberg v. New York* [9] "that the government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household' justified regulation of otherwise protected expression." The Court found that these concerns, along with the broadcast media's uniquely pervasive presence and unique access to children, justified special treatment of the broadcast of indecent material. *Id.* at 748-749.

6. In *ACT I*, the D.C. Circuit Court affirmed the Commission's action in one case involving the daytime broadcast of indecent material, but remanded for further explanation two other cases involving broadcasts aired after 10 m. In the two cases remanded, the court found that the Commission had not adequately justified its narrowing the "safe harbor" during which indecent material could be broadcast from the hours of 10 p.m. - 6 a.m. to midnight - 6 a.m. The court also rejected the Commission's suggestion that channeling decisions could be made on a case-by-case basis, finding that such an approach could have a chilling effect on broadcasters' exercise of their First Amendment rights. Thus, the court directed the Commission to afford broadcasters clear notice of reasonably determined times at which indecent material safely may be aired.

7. Shortly after the *ACT I* decision, Congress directed the Commission to enforce the broadcast indecency provisions of Section 1464 on a 24-hour basis.[10] In response, the Commission promulgated the rule which now is at issue in this case.[11] A number of petitioners challenged the rule, and on January 23, 1989, the D.C. Circuit in *ACT II* stayed its implementation pending judicial review.

8. Before briefing and oral argument had occurred on the merits of the 24-hour prohibition, the Supreme Court, in its *Sable* decision, addressed the extent to which the government may regulate indecent telephone messages. After noting that indecent speech is protected by the First Amendment, the Supreme Court nevertheless affirmed that "[t]he government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." *Sable*, 109 S. Ct. at 2836. Restating the point later in its opinion, the Court described the relevant constitutional standard as requiring that the means chosen by the government be "carefully tailored" or "narrowly tailored" to achieve the regulatory ends. *Id.* at 2839.

9. The Supreme Court in *Sable* distinguished the telephone medium from the broadcast medium, noting that "unlike an unexpected outburst on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it." 109 S. Ct. at 2837. Also, in a concurring opinion, Justice Scalia suggested that indecent broadcasts could be prohibited if data demonstrate "the infeasibility of alternate means to provide . . . adequate protection of minors." *Id.* at 2840 (Scalia, J., concurring).

III. DISCUSSION

10. As noted above, based on the record in this proceeding and the Court's decision in *Sable*, we believe that the Commission's enforcement of a 24-hour prohibition on indecent broadcast programming comports with the First Amendment. Using the "compelling interest/narrowly tailored" standard set forth in *Sable*, we conclude that a 24-hour prohibition is the most narrowly tailored means of effectively promoting the government's compelling interest in protecting children from broadcast indecency because there is a reasonable risk that a significant number of children are in the broadcast audience at all times of day and night. In addition, we find that: (1) "children" are appropriately defined as minors 17 and under; (2) the government has a compelling interest in regulating children's access to indecent broadcast material, as the courts and Congress consistently have found; (3) our definition of indecency is not vague or overbroad and, in fact, repeatedly has been upheld by the courts; (4) other alternatives for protecting children, such as ratings, warning devices, or lock-out mechanisms would be ineffective; (5) because the risk of exposure to children exists even in the late evening and early morning hours, a time channeling approach would not protect children from indecent broadcast materials; and (6) adults have alternative sources of indecent materials. In order to tailor our enforcement of the 24-hour prohibition on indecent broadcasting as narrowly as possible, however, in actual cases of alleged indecent broadcasting stations will be permitted to demonstrate that children were not in fact present in the broadcast audience for the market at the time the programming at issue aired.

A. Constitutional Standard

11. Several parties argue that the constitutionality of the indecency prohibition should be judged under the time, place and manner standard, rather than the more rigorous compelling interest/narrowly tailored standard applied by the Supreme Court in *Sable*.[12] However, based upon the Supreme Court's having applied the more demanding test in *Sable*, and similar views expressed by the D.C. Circuit in *ACT I* that content-based restrictions are sustainable only if "the regulation is a precisely drawn means of serving a compelling state interest,"[13] we believe it appropriate to apply the more rigorous standard.

12. It is well established that the First Amendment does not protect obscene speech, and that therefore the government has broad authority to regulate commerce in obscenity without reference to First Amendment principles. *Sable*, 109 S. Ct. at 2835; *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69 (1973); *Roth v. United States*, 354 U.S. 476, 481 (1957). In contrast, as the Supreme Court observed in *Sable*, "[s]exual expression which is indecent but not ob-

scene is protected by the First Amendment. . . ." 109 S. Ct. at 2836. *See also Pacifica*, 438 U.S. at 743 (Stevens, J.), 756 (Powell, J.). Nonetheless, the Supreme Court has indicated that it will uphold governmental regulation of indecent speech if the regulation meets the constitutional standards that the Court has articulated.

13. In *Sable*, the Court set forth the constitutional standard that governs restrictions on protected speech: the government may "regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." 109 S. Ct. at 2836. The Court also stated that the means chosen by the government must be "carefully tailored" or "narrowly tailored" to achieve the regulatory ends. *Id.* at 2836, 2839. While the standard has been expressed with somewhat different wording,[14] we understand it to require, essentially, a showing that the regulation or statute serves a compelling governmental interest and is narrowly tailored to serve that interest. This standard is substantially more rigorous than the time, place and manner test applied to content-neutral regulation of speech,[15] which requires only that the regulation be a reasonable means of serving "a significant governmental interest" and that it leave "ample alternative channels for communication." *Consolidated Edison Co. of New York v. Public Service Commission of New York*, 447 U.S. at 535. *See also Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 293 (1984); *Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984).

B. Governmental Interest

14. In effectuating our statutory mandate, our primary concern has been and remains the protection of children from exposure to indecent materials. *See* 134 Cong. Rec. S9912 (daily ed. July 26, 1988) (statement of Senator Helms); *Reconsideration Order*, 3 FCC Rcd 930, 931 (1987), *aff'd in relevant part sub nom. ACT I*, 852 F.2d at 1340; *Pacifica Foundation*, 56 FCC 2d at 97, *recon. denied*, 59 FCC 2d 892 (1976), *rev'd, Pacifica Foundation v. F.C.C.*, 556 F.2d 9 (D.C. Cir. 1977); *rev'd, Pacifica*, 438 U.S. 726. In both *Pacifica* and *Sable* the Supreme Court recognized the government's interest in assisting parental supervision of their children and, generally, in protecting the well-being of youth, citing *Ginsberg v. New York*, 390 U.S. 629, 639 (1968). *Sable*, 109 S. Ct. at 2836; *Pacifica*, 438 U.S. at 749-750. In the *NOI*, we solicited comment on whether a 24-hour prohibition of broadcast indecency advances this interest. We also noted that courts have recognized an alternative governmental interest in protecting the public's right to be free from indecent material in the privacy of their homes, and sought comment on this point.

15. Although parties generally agree that the government has an interest in protecting minors from indecent broadcasts, they differ on the scope of that interest. Some parties maintain that the government's sole legitimate interest is to facilitate parental supervision, and not to substitute governmental for parental supervision.[16] In contrast, Morality in Media (MIM) argues that a 24-hour prohibition on broadcast indecency advances an independent governmental interest in the well-being of minors,[17] and that the *Pacifica* decision can be read to establish an "indecent for all" (including adults) standard, and not merely an "indecent for children" standard.[18] On the other hand, Broadcasters argue that there is no legitimate interest in protecting adults from indecency, as adults have a right to receive constitutionally protected indecent material.[19] Several commenters argue that a 24-hour prohibition also advances a governmental interest in protecting the public's right to be free from indecent material in the privacy of their homes.[20] Cohn and Marks (C&M) disagrees, arguing that adults, unlike children, are capable of receiving the "first blow" from constitutionally protected indecent speech without undue damage.[21]

16. It is well established that protecting children from exposure to indecent material is a compelling governmental interest. *See e.g., Sable*, 109 S. Ct. at 2836; *New York v. Ferber*, 458 U.S. 747, 756-57 (1982); *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968); *Carlin Communications, Inc. v. FCC*, 749 F.2d 113, 121 (2d Cir. 1984). Two related rationales underlie this interest. First, as the Court explained in *Ginsberg* and reiterated in *Pacifica*, *see* 438 U.S. at 749-750, "parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society," and parents are "entitled to the support of laws designed to aid discharge of that responsibility." 390 U.S. at 639. Thus, the regulation of broadcast indecency is intended "to facilitate parental supervision of children's listening." *ACT I*, 852 F.2d at 1343. In addition, the Supreme Court has expressly stated that "a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" *New York v. Ferber*, 458 U.S. at 756-57, quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). As stated by the Court in *Ginsberg*, "[t]he State also has an independent interest in the well-being of its youth." 390 U.S. at 640. The Court quoted with approval from *People v. Kahan*, 15 N.Y.2d 311, 312, 206 N.E.2d 333, 334 (C.A.N.Y. 1965) (Fuld, J., concurring), which dealt with the sale of sexually explicit material to children:

> While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them. It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults.

390 U.S. at 640. *See also Prince v. Massachusetts*, 321 U.S. 158, 165 (1944) (state interest in protecting "the welfare of children" and preventing abuses that might prevent their "growth into free and independent well-developed men and citizens").[22] These two related purposes, supporting parental supervision and promoting the well-being of youth, support the enforcement of narrowly drawn measures to restrict children's access to indecent materials.

17. Despite the fact that protecting children from exposure to indecent material is recognized as a compelling governmental interest, some parties, including P.E.N. American Center *et al.* (PEN) and Broadcasters, argue that there is no proof that exposure to indecent broadcasts harms children. Broadcasters submit a study that concludes that few studies have been performed regarding harm resulting from indecency and that there is little evidence of harm to children.[23] On the other hand, Salem Communications Corporation (Salem) and American Family Association *et al.* (AFA) submit studies to support

their argument that exposure to indecent broadcasting has the potential to harm children. For example, AFA submitted findings from a clinical psychologist who concludes that children are harmed by pornography.[24]

18. The debate over harm to children is not at issue here. Irrespective of the continuing social science debate, the courts have recognized Congress' authority, derived from the governmental interest in protecting its youth, to regulate access by children to indecent material. As a legal matter, it is well established that exposure of children to such material may be harmful, even if that effect has not been completely proven scientifically. *See Pacifica*, 438 U.S. at 757-58 (Powell, J., concurring); *Ginsberg*, 390 U.S. at 641-43. In proscribing the dissemination of indecent material to minors, Congress has considered testimony that cites its harmful effects and has responded not only with the statute and mandate before us in this particular case, but also with the passage of other statutes that limit the availability of indecent material to minors.[25] For example, Congress has acted to protect minors from indecent telephone messages,[26] and the Supreme Court in *Sable* fully recognized Congress' authority to do so (although it held that Congress in that case had not sufficiently tailored its effort to serve this interest). *See* 109 S. Ct. at 2839. Similarly, in 1984, Congress required cable operators to make available to their customers a device to enable them to control reception of indecent programming to protect minors from inadvertent access. *See* 47 U.S.C. § 544(d)(2)(A). More broadly, the Supreme Court has upheld, in the face of a First Amendment challenge, a congressional statute which protects the public, and particularly children, from unwanted mail which the recipient considers offensively lewd. *See* 39 U.S.C. §§ 3008 and 3010 (1988); *Rowan v. Post Office Department*, 397 U.S. 728 (1970). These statutes evidence findings by Congress that children deserve protection from harm that indecent material may inflict. It is significant that the 24-hour prohibition specifically has been mandated by the Congress, and although Congress is not the ultimate interpreter of the Constitution, its findings and purposes are due deference as those of a co-equal branch of government charged with providing for the general welfare of the United States. *See Metro Broadcasting v. F.C.C.*, No. 89-453, 58 U.S.L.W. 5053, 5061 (U.S. June 27, 1990).

19. Our concern with the harm to children caused by exposure to indecent broadcast material is particularly strong given the range of materials that could be included in the "indecent" programming category (and thus conceivably could be broadcast between 8 p.m. and 6 a.m., given the current restrictions on our enforcement authority). As Justice Scalia noted in his *Sable* concurrence, "the more narrow the understanding of what is 'obscene,' and hence the more pornographic what is embraced within the residual category of 'indecency,' the more reasonable it becomes to insist upon greater assurance of insulation from minors." *Sable*, 109 S. Ct. at 2839 (Scalia, J., concurring).

20. It thus is significant that the courts have applied a very narrow definition of obscenity in ruling on pornographic films, holding that movies containing graphic depictions of sex acts, such as "Deep Throat" and "Debbie Does Dallas," are not legally obscene.[27] We recognize that these cases have not involved the broadcast media and that most broadcasters are likely to exercise self-restraint and not air such movies unedited. Our own enforcement actions demonstrate, however, that some broadcasters have been willing to air patently offensive, sexually explicit material that would seem to tread close to the obscenity line.[28]

21. The broad range of sexually-oriented material that has been or could be considered indecent or "protected speech" -- but not obscene speech -- accordingly heightens our concerns for preventing harm to children. Specifically, we find that Justice Scalia's statement in *Sable* is extremely relevant in the broadcast indecency context. It has become "more reasonable . . . . to insist upon greater assurance of insulation from minors" in light of the extremely pornographic nature of what may be encompassed within the category of broadcast indecency.

22. Although the Commission has focused on the government's interest in protecting children as a basis for regulating broadcast indecency, preserving the privacy of the home provides an alternative basis for upholding the constitutionality of the 24-hour prohibition. In *Pacifica*, the Supreme Court's first stated rationale for sustaining the Commission's decision was the right of all members of the public to be free of indecent material in the privacy of their homes. The Court found that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." 438 U.S. 726, 748, *citing Rowan v. Post Office Dept.*, 397 U.S. 728 (1970); *Id.* at 759-60 (Powell, J., concurring in part).[29] In *Sable*, the Supreme Court again referred to this residential privacy interest, noting the "unique" attributes of broadcasting, *i.e.*, that it "can intrude on the privacy of the home without prior warning as to program content." 109 S. Ct. at 2837.[30]

23. The government's interest in preserving the privacy of the home reinforces its interest in protecting children. As D.C. Circuit Judge Leventhal noted in his dissenting opinion in *Pacifica*, "[w]ith the pervasiveness of TV-radio and its reach into the home the choice made by broadcasters precludes an effective choice by the family. Because of the unique interest in home life, especially strong in homes where children are being raised, it is bootless to quote from cases that reflect a more permissive attitude to speech in public streets and places, without attention to the difference. . . . The reality of broadcasting's special access to the home conjoins with the passivity of TV-radio reception -- a mere click, without current purchase." 556 F.2d at 33 (Leventhal, J., dissenting). While the record demonstrates that a 24-hour prohibition on broadcast indecency is needed to advance our primary interest in controlling children's access to indecent materials, it also supports this alternative residential privacy interest, particularly the evidence concerning the pervasiveness of the broadcast media, the prevalence of random tuning and remote control devices, and the ineffectiveness of prior warnings. *See infra* at pp. 17-18 and 34-35.

C. Operative Definitions

1. Definition of Indecency

24. In carrying out its statutory responsibility to enforce Section 1464, the Commission consistently has defined indecency as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory ac-

tivities or organs." *Pacifica Foundation*, 56 FCC 2d at 98, 100 (1975), *aff'd*, *F.C.C. v Pacifica Foundation*, 438 U.S. 726 (1978); *Reconsideration Order*, 3 FCC Rcd at 930 ¶ 2 (1987), *rev'd on other grounds*, *ACT I*, 852 F.2d at 1338-39.[31] We continue to believe that this definition is sufficiently narrow to continue to pass muster under the First Amendment. Indeed, we note that the U.S. Court of Appeals for the D.C. Circuit, relying upon the Supreme Court's opinion in *Pacifica*, explicitly affirmed this definition recently in *ACT I*, 852 F.2d at 1340.

25. Many commenters agree that the Commission's generic definition of indecency retains its validity because it is sufficiently narrow and has survived Supreme Court scrutiny.[32] Others, however, claim that the definition is unconstitutionally vague,[33] and that the vagueness could suppress broadcast material with serious literary, artistic, social, and cultural value, as well as discussions on a range of subjects.[34] Several parties argue that the Commission should adopt a rule that defers to the reasonable, good faith judgments of licensees.[35] Finally, Broadcasters argue that a licensee should have a right to a trial *de novo* whenever the Commission applies the definition to specific circumstances.[36]

26. We do not believe that application of our definition of indecency will lead to unconstitutional censorship. We have emphasized that "subject matter alone does not render material indecent. Only when that matter is presented in a *manner* that is patently offensive will it be considered indecent." *Reconsideration Order*, 3 FCC Rcd at 932 (emphasis in original).[37]

27. Furthermore, we will continue to give weight to reasonable licensee judgments when deciding to impose sanctions in specific cases. We cannot, however, abrogate our statutory duty to enforce Section 1464 by deferring absolutely to broadcasters' judgments. *See ACT I* at 1340 n.14. Finally, in response to the suggestion by Broadcasters that a trial *de novo* be available, we note that under the procedure we have utilized for indecency enforcement actions, issuance of notices of apparent liability, a trial *de novo* is in fact available to any station that challenges the Commission's determination by not paying its forfeiture. *See* 47 U.S.C. § 504.

2. Definition of Children

28. We find that for the purpose of enforcing Section 1464,[38] children ages 17 and under constitute the category of persons that should be defined as "children." This conclusion is supported by the legislative history of the statutory 24-hour prohibition against indecent broadcasts, Supreme Court decisions addressing the regulation of other sexually explicit indecent materials, and other statutes governing the availability of indecent materials to children.

29. In the *NOI*, we noted that our 1987 enforcement rulings indicated that children 17 and under should be protected from indecent broadcasts, and sought comment on whether we should continue to so define children. Arguing generally that including all minors would be consistent with state laws protecting minors from other sexually explicit speech, some parties agree that "children" should include persons 17 years old and under.[39] However, opposing parties argue that even though states may protect children from obscenity, they do not protect children from indecency,[40] and that in any event there is no evidence that exposure to indecent speech harms children.[41]

30. Defining children to be protected from indecent broadcasts as those 17 years old and under is consistent with the legislative history of the statutory provision requiring the Commission to enforce Section 1464 twenty four hours a day. That history reveals that the statute's author intended to encompass children 12 to 17, as well as those under 12, within the class of persons to be protected by the 24-hour prohibition.[42] Since the statutory provision originated as an amendment introduced on the Senate floor, no committee reports exist for reference. The author's explanation, delivered immediately before the measure was adopted, therefore must be accorded substantial weight in interpreting the provision.[43]

31. In addition, defining children as those 17 and under is consistent with other laws regulating the availability of sexually explicit indecent materials to children. One such statute is the "dial-a-porn" prohibition, 47 U.S.C.A. § 223(b)(3) (Supp. 1990), enacted in 1989, which prohibits indecent telephone communications to persons under the age of 18. This provision is strong evidence that Congress has found that persons 17 and under should be protected from indecent materials. In addition, contrary to the comments cited above, the *NOI* at Appendix A lists statutes from 48 states that penalize persons for disseminating to minors materials that are sexually explicit, and not necessarily obscene by adult standards. Most of these state laws protect children ages 17 and under.

32. The government's interest in protecting children 17 and under from exposure to indecent materials also has been recognized by the courts. For example, when discussing an earlier version of the "dial-a-porn" statute, the Supreme Court in *Sable* explicitly recognized the government's "compelling interest in preventing minors from being exposed to indecent telephone messages," and tacitly approved Congress' decision to apply the statute to children ages 17 and under. 109 S. Ct. at 2839. Similarly, in *Ginsberg*, 390 U.S. at 631, and *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, the Supreme Court found a compelling governmental interest in controlling the availability of indecent matter to persons in the 12-17 age group. These precedents make clear that the government has a legitimate interest in protecting persons 17 and under from exposure to indecent broadcast materials.

33. We recognize that the court in *ACT I* criticized the Commission for not clearly defining "children" for purposes of applying Section 1464 and for failing to justify its application to the 12-17 age group.[44] In this report we clarify that all children 17 and under will be included in the protected age group. We find sufficient justification for adopting this definition in analogous federal and state statutes, Supreme Court precedent, and in the legislative history of the 24-hour statutory prohibition against indecent broadcasts. Accordingly, for purposes of protecting children from exposure to indecent broadcast materials, we will consider "children" to be persons age 17 and under.

D. Narrowly Tailored Means

1. Accessibility to Children

34. As did the Supreme Court in *Pacifica*, we find that the broadcast medium is uniquely pervasive and accessible to minors, and that these characteristics further justify prudent regulation of indecent broadcast programs. The Supreme Court has recognized that "each medium of expression presents special First Amendment problems."

Pacifica, 438 U.S. at 748. Broadcasting has specific characteristics that support regulation of indecency that would not necessarily be permissible if applied to other media. In particular, for purposes of regulating indecent broadcasting, the Court has noted "that broadcasting is 'uniquely pervasive,' can intrude on the privacy of the home without prior warning as to program content, and is 'uniquely accessible to children, even those too young to read.'" *Sable*, 109 S. Ct. at 2837, quoting *Pacifica*, 438 U.S. at 748-49.[45]

35. Notably, the Supreme Court in *Sable* distinguished indecent telephone services from broadcasting, observing that the caller to a "dial-a-porn" service must "take affirmative steps to receive the communication," 109 S. Ct. at 2837. In contrast, "[b]ecause the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content." *Pacifica*, 438 U.S. at 748. Thus, "[p]lacing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message." 109 S. Ct. at 2837.

36. The *Sable* decision strongly suggests that a 24-hour broadcast indecency prohibition is constitutional if it is the most narrowly tailored means of protecting children from exposure to indecent materials. The reversal of the dial-a-porn prohibition in *Sable* rested not on the failure to channel such communication, but on the government's failure to show that a complete prohibition on indecent dial-a-porn was necessary to meet the government's interest in protecting children from the indecent material. The emphasis the Court placed on the inadequacy of the record in *Sable* thus supports a conclusion that a total prohibition on indecency would be upheld if the record demonstrates that no alternative would effectively serve the compelling interest at stake.

37. The record in this proceeding confirms the general pervasiveness and accessibility of broadcasts to children. TV, available in virtually every household, is viewed an average of 26 hours per week by children ages 2 to 17 years old.[46] Between 25% and almost 50% of children have a TV set for their personal use.[47] Radio is even more pervasive, with each household having an average of over five radios. Over 99% of children age 12 to 17 listen to radio at least once a week.[48] Moreover, as described in detail *infra*, children do not just have general access to the broadcast media, but they in fact tune in to their radio and television sets without meaningful supervision at all times of the day and night.

2. Children's Listening and Viewing Habits

38. The record indicates that there are children in the radio and television audience at all hours of the day and night. The data further shows that a significant number of these children are not subject to active parental supervision, even during the late evening and early morning hours.

a. Radio

39. The data submitted in response to the *NOI* indicate that there are children in the radio listening audience at all times of day, with an average of nearly three-quarters of a million children listening to radio between midnight and 6 a.m. From this data we conclude that there is no time during which indecent material could be broadcast on radio without a reasonable risk that significant numbers of children will be listening to it.

40. The Commission's initial review of radio ratings and surveys revealed little quantitative information about the radio listening habits of children under 12 years of age, although listening data for children ages 12-17 were available. These data indicated that, in all time frames measured, including midnight to 6 a.m., a higher percentage of all children ages 12-17 listened to radio than the percentage of all adults 18 and over listening to radio. Furthermore, post-midnight listening for children ages 12-17 averaged 2 3/4 hours per week.[49]

41. The *NOI* indicated that the national listening audience for children ages 12-17 between midnight and 6 a.m. peaked at 1,471,000 between 12:00 and 12:15 a.m., decreased gradually to a low of 309,000 between 3:45 and 4:00 a.m., and then increased to 1,429,000 between 5:45 and 6:00 a.m. The average quarter-hour audience for the entire six hour block of midnight to 6 a.m. was 716,000 children ages 12-17. The average one day cume (the estimated number of *different* persons who listen to radio for a minimum of five minutes within a specified time frame) for between midnight and 6 a.m. was 3,533,000 children ages 12-17. That is, during any given midnight to 6:00 a.m. time frame on any given day, 3,533,000 different children ages 12-17 in the United States listened to the radio for at least five minutes. The weekly cume for listening between midnight and 6 a.m. was 10,896,000 children ages 12-17. These listeners constituted 10 to 12 percent of the post-midnight total listening audience and this proportion was generally consistent for daytime listening as well.[50] We requested comment on these data and asked commenters to submit any other data or studies regarding listening habits of children and adults.

42. Commenters supporting the 24-hour prohibition submit that children ages 12-17 make up a substantial portion of the radio audience. MIM submits radio listening data for children ages 12-17 for New York, Chicago and Los Angeles collected by Arbitron for the summer of 1989.[51] MIM combines the data for the three markets and makes a national projection of post-midnight listening by children ages 12-17 that is remarkably close to the national data presented in the NOI.[52] MIM estimates that from 12 to 1:00 a.m. the average quarter hour audience for this age group nationally is 1,334,557, which is very close to the Commission's estimate of 1,429,000 for 12 to 12:15 a.m. MIM's estimated low in listening among children ages 12-17 occurs at 4-5 a.m. with 220,067 in the audience, whereas the Commission estimated 309,000 in the audience from 3:45 to 4:00 a.m.

43. Bonneville International Corporation (Bonneville) reviewed data on audiences for several of its radio stations that it classifies as having "some teen appeal," and found that children ages 12-17 are in the audience post-midnight. Bonneville also reviewed data for non-Bonneville stations in markets in which Bonneville has stations and, similarly, found stations with greater post-midnight listening by children ages 12-17 than any other demographic group.[53] Salem submits a Bakersfield, California, radio study showing that 28% of children ages 12-17 in that market listen to radio between midnight and 6 a.m.[54] National Religious Broadcasters (NRB) also submits radio data for Detroit and Tampa showing large numbers of 12 to 17 year olds listening to radio at all times of the day and night.[55]

44. Broadcasters claim that the audience for certain programming that the Commission is reviewing as (or has deemed to be) indecent contains few children, referring to a Gallup survey of New York area households with children ages 6-11 commissioned by Infinity Broadcasting indicating that in 99.6% of households surveyed, no children in that age group listen to the Howard Stern morning radio show.[56] In the sole household that reported a child listening to that show, it was reported that the child was supervised by an adult.[57] MIM responds that although Broadcasters assert that few children ages 6 to 11 listen to the Howard Stern show, there are older children in the audience. As reported in Arbitron's *Summer 1989 " Radio Market Report* " for New York, only 5 of the 48 stations listed for the New York market have a greater audience of children ages 12-17 than WXRK-FM Monday through Friday, 7-8 a.m., when a portion of the Howard Stern show is broadcast. MIM further states that Arbitron reports an estimated 10,600 children ages 12-17 listened to the Stern show for at least 5 minutes during any quarter hour from 7-8 a.m. Monday through Friday in the summer of 1989.[58]

45. Other commenters opposing the 24-hour prohibition dispute the Commission's initial findings and submit radio listening data in support of their position. KDVS-FM (KDVS) urges that channeling be used to enhance parental responsibility, and states that Arbitron and other radio surveys suggest that the number of young children in the audience during school hours is only between 3 and 5% of the potential audience of children ages 12-17. This group comprises only 1-4% of the total audience during these broadcast hours. Both of these figures are far lower than even those seen in the 11 p.m.-midnight sampling, and approximate the post-midnight sampling. KDVS claims that these statistics suggest two appropriate times for channeling -- during the school day and the late evening hours. KDVS also states that the same survey (Arbitron *Fall 1983)* reported that, during Monday through Friday, 7 p.m. to midnight, only 10% of the total audience of children ages 12-17 listened to radio outside the home at those hours. Therefore, argues KDVS, most of the children in the radio audience would be subject to adult supervision.[59]

46. KDVS also states that children ages 12-17 make up only 10% of a very small midnight to 6 a.m. listening audience. KDVS maintains that nationally, only about 3.5% of children ages 12-17 are present in any quarter hour post-midnight time frame for all stations. KDVS estimates that if this age group comprises 10% of the population, then the 3.5% of all children ages 12-17 listening to radio post-midnight represents only 0.35% of the entire population.[60] Finally, KDVS states that the Commission, in the *NOI,* did not identify estimates of the sampling error or relative standard error involved in the ratings.[61]

47. Pacific *et al.* (Pacifica) also claims that listening statistics regarding children ages 12-17 are flawed in their application. Pacifica states that the Commission gives the impression that a significant number of children in this age group listen to radio generally. Pacifica, like KDVS, claims that the percentage of children ages 12-17 of the total listening population (the largest possible representation of these data) does not reflect the percentage of these children in the actual total population. Pacifica states that the 12-17 year old listening population should be divided by the total population to obtain a more realistic representation of this group's listening.

48. Pacifica further observes that such data do not reflect children's listening to public radio stations. Pacifica relies on data from Arbitron, Spring 1989, to conclude that children ages 12-17 listening to public radio stations account for a mere 0.2% share of this group's listening to radio and no [0] share of total radio listening. Only 1.5% of the population of children ages 12-17 tuned into public radio for 5 minutes during an average week from this survey.[62] Broadcasters also refer to the minimal audience of children ages 12-17 that National Public Radio (NPR) attracts. Broadcasters submit that, according to the Arbitron National Report (Spring 1989), member stations carrying NPR programming have *no* measurable audience in this age group from 6 to 10 a.m. and 6 p.m. to 6 a.m.[63]

49. The submitted data confirm our initial determination that there are a significant number of children in the listening audience at all times of day and night. MIM, Salem and NRB have submitted data illustrating that the listening patterns of children ages 12-17 are similar to those described in the *NOI*. [64] which indicated that the percentage of children in this age group listening to radio during all time frames was higher than the percentage of adults age 18 and over listening to radio.[65] These 12 to 17 year olds represent over 10% of the 6.9 million total average quarter-hour listening audience from midnight to 6 a.m.[66] Although KDVS maintains that there are few children ages 12-17 in the listening audience during the day, even low numbers of children (KDVS' submission indicates that 1-4% of the total audience is children ages 12-17) confirm that there are significant numbers of children listening to radio during school hours. Similarly, although KDVS maintains that 12 to 17 year olds listening between midnight and 6 a.m. during any quarter hour make up only 0.35% of the total population, this figure represents 3.5% of all children in this age group in the U.S., or 716,000 children ages 12-17. [67]

b. Television

50. Our initial data, and data supplied by several commenters, validate the Commission's concerns regarding children's viewing, especially late night viewing, of television. These data demonstrate that there is a reasonable risk that a significant number of children are present in the nationwide television viewing audience at all times.

51. The *NOI* stated that, based on ratings data, children are in the television audience throughout the day. Unlike radio, there are no reported data reflecting television viewing by age between 2:00 and 6:00 a.m. That which is available, however, demonstrates that children, particularly those ages 12-17, remain in the viewing audience throughout the last reported time period ending at 2:00 a.m. The data also indicate that between 3% (for ages 2 to 5) and 8% (for ages 12-17) of children's weekly viewing occurs between 11:00 p.m. and 1:00 a.m. The *NOI* also analyzed Arbitron data depicting the percentage of persons by age group that watch TV from 6:00 p.m. to 1:45 a.m. in four selected markets. These data show that percentage-wise, as many children ages 12-17 as adults watch television during the late evening hours, and that a higher percentage of 12 to 17 year olds than adults may watch television during these hours in some markets during the

summer months.[68] We requested comment on these data and solicited additional studies or data regarding children's viewing.

52. The United States Catholic Conference (USCC) submits results of a radio listening and television viewing survey of almost 8100 children attending Catholic diocesan schools (5,726 age 12 and under and 2,346 age 13-18). The USCC survey indicated that children 12 and under watch an average of 3.5 hours of television per day, mostly from 3-9 p.m. Monday through Friday, and an average of 6 hours per day on the weekend, mostly from 8-11 a.m. and 7-11 p.m. USCC also reported that children age 13-18 watch an average of 3.5 hours per day, mostly from 4-11 p.m. Monday through Friday, and an average of 6 hours per day on the weekend, mostly from 7-9 a.m. and 2-11 p.m.[69] USCC concludes that *if* a reasonably clear distinction between times when children are and are not in the audience can be discerned, then time of day restrictions for the broadcast of indecent material could be established.

53. KDVS takes issue with the Commission's graphic representation of Arbitron television viewing data for the four markets that appear in Appendix C of the *NOI*. It asserts that the post-10:30 p.m. periods are measured in fifteen-minute intervals, whereas pre-10:30 p.m. time periods are measured in thirty-minute intervals, thus depicting the rate of audience decline after 10:30 p.m. as slower than it is in reality. KDVS further states that the Commission has implied incorrectly that the proportion of age groups represented on the charts is indicative that each group is similar in size.[70]

54. Several commenters have filed evidence indicating that children comprise a significant portion of the late night audience. Salem and NRB submit data showing that, in five metropolitan areas, the number of children in the viewing audience late at night is substantial.[71] For example, in the Washington, D.C. market, for July 1989, seven percent of children ages 12-17 and four percent of children ages 2-11 are in the viewing audience from 1:45 to 2:00 a.m., Monday through Friday. Salem averages the data for the five markets and projects the national television audience for various post-11:00 m. time frames. For the 1:45-2:00 a.m. period, Salem projects that, nationally, 4.8% of children ages 12-17 watch television. This translates to over 970,000 12 to 17 year olds in the television audience at that hour.[72]

55. These data and our initial data confirm our belief that there is a reasonable risk that significant numbers of children are watching television at all times, including late at night. USCC's suggestion that distinctions can be made as to when children are or are not in the viewing audience is unpersuasive. Its survey indicates only that children watch TV *mostly* in certain time frames, but these time frames are not all-inclusive of children's viewing. In addition, we note that 66.9% of U.S. television households have videotape recorders (VCRs).[73] Through VCRs, children can record late night programming for viewing during daytime, thus obtaining access to programs even if they are not in the audience when the programs are initially aired.

56. KDVS' arguments regarding the data presented in the *NOI* also are unpersuasive. Depicting audience in 15 minute intervals as opposed to 30 minute intervals from 10:30 p.m. to 1:45 a.m. achieves a greater level of accuracy in the measurement of late night TV audiences. Using 30 minute increments does not alter the percentage of each age group that is watching TV at those times. We agree with KVDS that the rate of decline for *all* audience segments is relatively steep late at night. This does not change the evidence indicating that children remain in the viewing audience late at night. With regard to KDVS' contention that the Commission implied that each age group in the four markets charted in Appendix C of the *NOI* is similar in size, such an implication was not made. The *NOI* states that the percentage of each demographic group is represented on the chart. While the percentages of each group are, in some cases, equal, the actual numbers of each group are not. Nevertheless, there appears to be a reasonable risk that significant numbers of children are in the television viewing audience at all times.

c. Supervision

57. As previously noted, the government has a clearly established compelling interest in protecting children from exposure to indecent broadcast materials, both to facilitate parental supervision of their children and to generally promote the well-being of youth. In order to compile a record with respect to supporting parental supervision, the *NOI* requested comment on parents' ability to supervise children's listening and viewing, whether parents in fact supervise listening and viewing, and whether parents are concerned about their children's exposure to indecent broadcasts. Our preliminary finding was that there is significant unsupervised television viewing by children on a daily basis. In addition, while there are fewer data available to measure unsupervised radio listening among children, we preliminarily concluded that, because of the number of radios per household, a significant number of children have the opportunity for, and actually engage in, unsupervised listening.[74] Our review of the record in this proceeding confirms the validity of these preliminary findings, and demonstrates that unsupervised children are watching and listening to television and radio at all times of day and night.

58. Broadcasters dispute the *NOI*'s assumption that in order to supervise their children, parents must co-view or co-listen with them or have specific knowledge of their viewing or listening. Broadcasters argue that as long as parents or other adults are present, they have the opportunity to supervise their children's viewing and listening. Broadcasters maintain that examining the presence of adults as the key to whether children are subject to adult supervision is analogous to the methods used by courts to examine the regulation of indecent material by cable and telephone. Rather than examining the actual use of technical devices to block reception of indecent material transmitted by cable or telephone, or examining parental supervision, Broadcasters state that courts instead analyze the opportunity to use these methods to block reception.

59. Broadcasters commissioned a survey of 1,000 homes with children 17 and under to determine opportunities for parental and adult supervision. According to the survey, over 88% of children were under parental supervision and 98% were under adult supervision between the hours of 8:00 p.m. and 6:00 a.m. During the 10:00 p.m. to 6:00 a.m. period, over 93% of children were under parental supervision and 99% were under adult supervision. Between midnight and 6:00 a.m., over 98% of children were under parental supervision and 99% were under adult supervision.[75] Broadcasters claim these data dem-

onstrate that parents or other adults have the opportunity to supervise their children's viewing and listening during these hours.

60. MIM disputes Broadcasters' study, arguing that under the "opportunity for supervision" theory advanced by Broadcasters, the study equates presence with supervision, assumes that a child will not watch television or listen to the radio after his or her bedtime, and assumes that supervision by anyone over the age of 18 is the equivalent of parental supervision.[76] AFA argues that even if a child is in the presence of an adult, that adult may not supervise a child as a parent would.[77] Even when parents are home, AFA argues, there is limited parent-child co-viewing of television. AFA submits the results of a 1989 study of co-viewing habits of parents and children that concludes that parents generally do not view family series with their children. The study found that, on average, parents and second graders co-viewed 5.6 prime time and 1.96 syndicated series in the last year. Parents and sixth graders co-viewed 7.21 prime time and 2.05 syndicated series, while parents and tenth graders co-viewed 7.63 prime time and 2.8 syndicated series. The study determined that for all series and for prime time series only, the mean co-viewing frequency was between something less than "just a few times this year" and "have watched [together], but not in the last year."[78] The authors of this study claim that "parents co-view with children, particularly when their viewing preferences coincide, and that co-viewing is associated with generally positive parental attitudes toward television and specific beliefs in encouragement for children learning from television. [The data] do not, however, suggest that co-viewing is very much motivated by an active determination to mediate children's television experiences."[79] On the other hand, USCC submits a survey of over 8,000 parochial school students showing that 81% of the respondents ages 12 and under, and 70% between the ages of 13 and 18, watch television with an adult at night. The study also shows that 72% of the respondents ages 12 and under, and 90% between the ages of 13 and 18, sometimes or almost never listen to radio with an adult.[80]

61. The record before us demonstrates that the pervasiveness and accessibility of television and radio, coupled with the lack of effective parental control mechanisms, discussed *infra*, make effective parental supervision exceedingly difficult if not impossible for the average parent. We noted in the *NOI* that 63% of television households have more than one television set, and of the ninety-nine percent of households with radios, each household has, on average, over five.[81] The number of televisions and radios in households can easily prevent a parent from actively supervising a child's viewing and listening habits. In a household with more than one television, a child may watch a program without parental knowledge. VCRs permit a child to tape a television program for later viewing without parental knowledge. The ability to listen to radio without parental knowledge is even greater, given the number of radios in the average household, their portability, and the widespread use of headphones.

62. We note, moreover, that parents' control of children's television viewing and radio listening differs from parental control of cable viewing and telephone calls. Technical means are readily available to block children's access to indecent cable programs and indecent telephone calls. Upon request, cable operators must provide a device such as a "lock-box" or "parental key" that permits a subscriber to restrict access to selected programming.[82] and access codes and scrambling are among the methods which can restrict children's access to dial-a-porn services.[83] In both instances, these methods can restrict access by children whether or not parents are physically present and actively supervise. In the case of television and radio, however, there is no comparable means that is readily available upon which parents may rely to prevent children from watching indecent off-the-air broadcast television programs or listening to indecent radio programs. Most television receivers do not permit blocking of specific channels,[84] and channel blocking devices are not available for radios. There is no evidence in the record that a lock-box type of device is available for attachment to televisions and radios to prevent access to specific channels. Therefore, because parents cannot rely on technical devices to prevent children from viewing indecent programs, parents can effectively supervise their children only by co-viewing or co-listening, or, at a minimum, by remaining actively aware of what their children are watching at all times. As many concerned parents filing comments in this proceeding emphasized, however, it is not practical for parents to exercise this type of control. The letter of Elizabeth Urquhart of Houston, Texas, addressed to Commissioner Duggan, succinctly sums up the point made in a large number of other letters submitted in this proceeding in stating that "[I]t is not a matter of my responsibility to monitor. A person (parent) would have to be super human to monitor every program a child might watch - in and out of our home [*sic*]."[85]

63. We do not believe that Broadcasters' study demonstrates that parental presence alone can adequately protect children from indecent broadcast programming. Broadcasters' data show that at no time during the day are all children under parental supervision. Even during the period of time from 1:00 a.m. to 6:00 a.m., the survey found that 1.2% of the children were neither with a parent nor asleep.[86] Since children are in the broadcast audience during this period, it is not unlikely that some of these children could watch indecent programming broadcast late at night. In addition, although the survey asked parents if the child in question was "in the presence of at least one parent, stepparent, or legal guardian," the term "presence" was apparently undefined. A respondent may have answered that the child was in the "presence" of a parent even if the child was awake in another part of the home and the parent asleep. Nor did the survey ask what parents were doing during the hours that they were in the presence of children. Because there is no technical means to prevent children from viewing or listening to particular programs, supervision requires parents either to co-view or co-listen, or to remain actively aware of a child's viewing or listening at all times. As a practical matter, mere "presence" in the same house as a child does not necessarily translate into supervision.

64. Commenters have not disputed our estimates of the amount of unsupervised television viewing by children. Our analysis, based on a 1980 study of 817 American households with children between the ages of 6 and 17, estimated that the maximum amount of unsupervised children's daily viewing ranges from 212 to 222 minutes and the minimum ranges from 40 to 54 minutes.[87] We also estimated that among children in certain age groups the maximum amount of unsupervised children's daily viewing could range from 357 to 375 minutes, if we assume that all of a child's viewing in two-television

households occurs on a separate set from the parents'.[88] The *NOI* also suggested that the number of radios in households made a substantial amount of unsupervised radio listening by children likely. The data submitted by the parties to this proceeding do not refute these estimates. In any event, the record demonstrates that parents cannot always provide meaningful supervision, even when they are present at home. Accordingly, we conclude that there is a substantial amount of unsupervised viewing and listening by children, and that as a practical matter, the pervasiveness and technology of broadcasting serve to deny parents the means necessary to exercise effective control over these activities.

d. Conclusions

65. The above evidence indicates that there is a reasonable risk that significant numbers of children are in the audience for radio and television broadcasts at all times of the day and night. The number of children present, moreover, clearly is more than "a few of the most enterprising and disobedient young people." *Sable*, 109 S. Ct. at 2838. For example, evidence submitted by the commenters indicates that, in all time frames measured, a higher percentage of all children between the ages of 12 and 17 listen to radio than the percentage of all adults age 18 and over, even between midnight and 6 a.m.[89] Although some commenters claim that 12 to 17 year olds listening between midnight and 6 a.m. during any quarter hour make up only 0.35% of the total population,[90] this figure represents a full 716,000 children between the ages of 12 and 17.[91]

66. Similarly, the record demonstrates that there is a reasonable risk that a significant number of children are in the television audience throughout the broadcast day and night. As previously noted, available data show that children, particularly those between the ages of 12 and 17, are in the viewing audience until the last time period reported for television ratings. The data further show that as high a percentage of children ages 12 to 17 as adults watch television during the late evening hours. Indeed, for the 1:45 to 2:00 a.m. time period, one commenter has estimated that there are over 970,000 12 to 17 year olds in the television audience.[92] These figures, of course, do not take into consideration the number of children who may be using VCRs between midnight to 6 a.m. to record television programs for viewing at a later time.

67. The data further show that a significant number of children in the broadcast audience are not subject to active parental supervision, even during the late evening and early morning hours. Although Broadcasters have submitted a study alleging that many children are under "parental supervision" at all times of the broadcast day, the study does not establish that parents in fact actively supervise their children's viewing and listening of radio and television; rather, it shows only that most children are usually in the "presence" of an adult, an undefined term that leaves open the possibility that children may be watching or listening to a television or radio while their parents (or other adults) are in other parts of the house or are asleep. The record, moreover, indicates that children engage in unsupervised viewing and listening throughout the day and night not because of a lack of concern by parents, but because of the impracticality of total supervision that derives from a combination of the technology involved and the lack of available and effective parental control devices.

68. In sum, the evidence establishes that, given the pervasiveness and accessibility of radio and television, unsupervised children in pursuit of entertainment need be neither "enterprising" nor "disobedient" to turn on a television or radio, or to record a program on a VCR, at any time of day or night. Accordingly, we conclude that there exists a reasonable risk that a sufficient number of children are in the broadcast audience at all times to warrant narrowly-tailored government regulation of indecent broadcasting aimed both at facilitating parental supervision and promoting the well-being of youth. Such regulation is particularly necessary since, as previously discussed, a wide range of sexually explicit and patently offensive material may be encompassed within the definition of "indecency."[93]

E. Alternatives to 24-Hour Prohibition

69. The *NOI* solicited comment on alternatives to a 24-hour prohibition, including (1) channeling indecent broadcasts to a time of day when children most likely will not be exposed to them; (2) using program rating codes or pre-broadcast warnings to protect children; and (3) relying upon broadcast technologies to limit children's access. After careful consideration of the record, we conclude that none of these options can effectively advance our interest in protecting children from indecency and, accordingly, that a 24-hour prohibition is the most narrowly tailored means of serving this compelling government interest.

1. Time Channeling

70. Time channeling would establish a specific time period during which non-obscene, but indecent adult-oriented programming could be aired. The feasibility of this alternative depends on whether indecent broadcasts could be channeled to hours when it is unlikely that children would be in the audience. We conclude that, based on the data indicating that there is a reasonable risk that children are present in the viewing and listening audience at all times, there is no time when the reasonable risk of children in the audience is sufficiently low to make their exposure to indecent programs unlikely. Accordingly, we conclude that it would not be possible for broadcast stations, as a general matter, to channel indecent material to certain times of the broadcast day without risk that a significant number of children will be watching or listening without meaningful parental supervision.

71. Broadcasters argue that channeling broadcasts to times of day when parents have an opportunity to supervise their children gives parents a meaningful opportunity to prevent children's access to indecent programs.[94] A 24-hour prohibition, argue Broadcasters, places government in the position of deciding what children should see and hear.[95] KDVS suggests that the Commission implement time channeling during school days, when there is a reduced risk that children would be in the broadcast audience.[96] Other parties, however, note that a number of children are alone during various times of the day.[97] In this regard, we note that *ACT I* affirmed the Commission's regulation of a daytime indecent broadcast.[98]

72. Finally, AFA argues that the effectiveness of a time channeling approach is diminished by the proliferation of VCRs, claiming that an estimated seventy-five to eighty percent of households with children have VCRs.[99] KDVS counters AFA's claim, arguing that most VCRs are purchased by parents, frequently for the personal use of their

children, and that parents therefore must be aware of the possibility that their children may use VCRs to tape broadcast programming.[100]

73. After further consideration of time channeling, we conclude that we cannot identify a time when the reasonable risk of children in the audience is sufficiently low to make their unsupervised viewing of indecent programs unlikely.[101] We have determined that at all times there is a reasonable risk that significant numbers of children are in the broadcast audience for television and radio. The proliferation of VCRs further undermines a channeling approach for television, for, as AFA noted, a majority of households with children have VCRs that children may operate to tape a program. Clearly, many teens and even younger children know how to use the recording and playback functions of a VCR. As a result, delayed viewing on a VCR provides children with access to programs broadcast at a time when their live viewing is least likely.

74. Broadcasters' argument that stations should be permitted to channel indecent programming to times of day when parents have an opportunity to supervise their children, moreover, fails to address the impracticality of parents supervising their children's listening and viewing 24 hours a day.[102] The record in this case includes thousands of letters from parents addressing this issue and convinces us that parents who wish to exercise such supervision do not have the tools or time available to do so because of the pervasiveness of the broadcast media and the lack of effective parental control devices.[103] Although Broadcasters' study attempts to show that opportunities for parental supervision are extensive, it fails to demonstrate that meaningful parental supervision is possible as a practical matter.[104] Indeed, in view of the substantial amount of unsupervised viewing and listening by children, the number of children who are without parental supervision and the factors interfering with parental ability to supervise children's viewing and listening effectively, we must conclude that time channeling would be an ineffective means of protecting children from broadcast indecency.

75. Several commenters also argue that, because the Commission's definition of indecency and its indecency enforcement policies are allegedly vague, unless a time channeling approach is adopted in lieu of a 24-hour prohibition, the threat of sanctions could deter some broadcasters from presenting programs that are not actually indecent.[105] C&M maintains that time channeling recognizes the rights of broadcasters to transmit constitutionally protected indecent speech and the rights of listeners to receive indecent programming.[106] This request for a "safe harbor" to present indecent programming reflects a belief that a broadcaster cannot determine with any degree of certainty whether a specific program violates the guidelines adopted in this proceeding. This is incorrect. Our definition of indecency, read in conjunction with our decisions in enforcement actions, provides licensees sufficient guidance to decide whether a program would be indecent.

2. Ratings and Warning Devices

76. Another alternative to a 24-hour prohibition of broadcast indecency is the use of a voluntary industry ratings code for television and radio broadcasts. The ratings, which would be published in television and radio guides and announced prior to each program, would alert the viewer or listener to the content of the program. We conclude that ratings and warnings would not effectively limit children's exposure to indecent programming, since this method would require parents to actively supervise their children's listening and viewing at all hours and in all locations. The effectiveness of ratings and warnings is further reduced by random tuning behavior known as "grazing," in which viewers use television remote control or radio scanning devices to rapidly tune through the entire channel menu until they find something interesting enough to hold their attention.

77. The *NOI* requested comment regarding the use of a voluntary industry ratings code for television and radio broadcasts. However, the *NOI* expressed doubt that ratings and warnings would prevent minors from viewing or listening to indecent programming because the broadcast audience is constantly tuning in and out of programs, and suggested that random tuning behavior may be even more prevalent today than when *Pacifica* was decided in 1978.[107] The *NOI* suggested that children could be exposed to different programming in rapid succession without warning as to content either because they graze or because they are co-viewing with others who are grazing.

78. Several commenters address the possible use of ratings and warning devices. USCC and KDVS suggest that a combined time channeling and ratings system could be effective.[108] However, AFA and Salem suggest that ratings require parental supervision in order to be effective.[109] Other commenters fear that an indecency warning could attract children to a particular broadcast[110] or that a warning could serve to "license" an indecent broadcast by warning the viewer of content.[111] Several commenters also specifically responded to the Commission's discussion of grazing. Broadcasters submits a study conducted by Arbitron and NAB of 13,000 radio listeners aged 12 and over showing that this group listened to an average of 2.99 radio stations per week.[112] Broadcasters concludes that this study indicates that neither adults nor children engage in significant random tuning for radio. Pacifica claims that radio listeners, especially those who listen to noncommercial radio stations, do not engage in grazing.[113] On the other hand, others contend that grazing is prevalent.[114]

79. We conclude that ratings and warnings would not effectively limit children's exposure to indecent programming. Currently there is no device which would permit a parent to "lock out" programming. Unless it were practical for parents to supervise viewing at all times, a child may ignore a warning and view or listen to indecent programming. Indeed, a warning may attract a child's attention and lead the child to view or listen to the program. This is of particular concern because of the significant amounts of unsupervised viewing and listening by children. We also believe that grazing is sufficiently common to reduce the effectiveness of ratings, even if a child is supervised. Grazing and channel changing by either a parent or a child may cause the viewer or listener to miss a content warning.[115] We believe the study cited by Broadcasters indicating the average number of radio stations listened to per week is not relevant in determining whether grazing occurs. Grazing involves turning to a number of channels in a short period of time, and such rapid switching may not be reflected in ratings. Broadcasters do not state whether the study asked listeners if they engaged in grazing to find those channels, or if they ever engaged in grazing. Therefore, we conclude that lack

of parental supervision, coupled with the proclivity of viewers and listeners to graze, would undermine the efficacy of a system of ratings and warnings.

3. Broadcast Technologies

80. The *NOI* requested comment on whether there are feasible broadcast technologies that could restrict children's access to indecent broadcasts. We conclude that although such technology may be feasible, no such technologies are currently available to the public for this purpose.

81. The *NOI* suggested that the FM or television aural subcarrier could be used for the broadcast of audio indecency. The subcarrier signal would be receivable only by special decoders. Salem supports the *NOI*'s assessment that subcarriers could be used to provide audio indecency. Salem maintains that an FM station could install a subcarrier signal generator at minimal expense, and that decoders for home use currently cost approximately $60, but could be expected to fall in price if produced in large quantities.[116] John W. Olivo, Jr., suggests use of a signal that would permit electronic blocking of programs by home receivers. KDVS, however, suggests that alternative broadcast technologies may not be financially feasible for many broadcasters, particularly noncommercial stations.[117]

82. As another alternative, NRB suggests that the Commission permit the broadcast of scrambled indecent material at any hour.[118] Kennedy Broadcasting ("Kennedy") similarly suggests that low power television (LPTV) stations be permitted to offer adult-oriented programming if scrambled. NRB and Kennedy argue that the decoder necessary to view scrambled programming would protect children from indecent material in much the same way as a cable lock-box or parental key. Kennedy also asks the Commission to state whether indecency standards will be applied to subscription television.

83. With respect to scrambling, we note our previous statements that we do not impose regulations regarding indecency on encrypted services, such as subscription television, that lack "the indiscriminate access to children that characterizes broadcasting." *Video 44*, 3 FCC Rcd 757, 760 n.2 (1988), *rev. on other grounds sub nom. Monroe Communications Corp. v. F. C. C.*, 900 F.2d 351 (D.C. Cir. 1990). While signal blocking and subcarrier use appear to be technologically feasible to prevent reception by individuals not wishing to receive certain signals, neither is available today, so we cannot rely on these technologies either to protect children from exposure to indecent broadcasts or to assist parents in supervising their children's viewing and listening. Use of a signal as suggested by Olivo also is not available today nor expected to be available in the foreseeable future, and may or may not prove practical. However, we encourage interested parties to continue to bring to our attention technologies or other means capable of restricting access by children to indecent broadcast programs.

F. Non - Broadcast Alternative Programming Sources

84. We recognize that we must be sensitive to the concern of the Supreme Court that the adult population not be reduced to seeing or hearing only what is fit for children.[119] In *Pacifica*, the Supreme Court recognized that non-broadcast alternatives to broadcast indecency are available to adults, including tapes, records, theaters and nightclubs. The *NOI* requested comment on whether these non-broadcast alternatives and additional non-broadcast alternatives, including cable with a lock-box capacity, videocassettes, audiocassettes, and motion pictures, provide adults with access to visual and audio programs functionally equivalent to those that would be proscribed from broadcast. We noted that cable television, a non-broadcast alternative not mentioned by the *Pacifica* Court, provides adults with access to programming designed for mature audiences yet incorporates equipment that facilitates parental control over the viewing of their children. Several commenters agree with the Commission's assessment that adults have many alternative sources of indecent material.[120] AFA submits an analysis of the MPAA ratings for 1,309 movies shown on premium cable services from December 26, 1987, through January 12, 1990, and claims that 663, or 51%, were R-rated.[121]

85. In response, Broadcasters argues that total suppression of indecent material in the broadcast medium would deprive adults of their ability to receive protected material, and thereby would violate their First Amendment rights,[122] because much material that might be indecent either is not available elsewhere or could be found only with time or effort. Broadcasters also claims that live radio and television talk shows, special news reports, public affairs programs, and many made-for-television entertainment programs are not available elsewhere. Broadcasters maintains that at least seven of the broadcast programs that triggered Commission action in 1989 contained material that was unavailable in any other medium.[123] Even if some material is available, Broadcasters asserts, many adults will be deterred from obtaining the material because they will have to determine if the material is available and then purchase it. Furthermore, the timeliness of the material will be lost and, with it, a large measure of at least some of the programs' value.[124] Broadcasters also argues that adults' ability to purchase indecent material is irrelevant constitutionally because the Supreme Court has "made clear that free speech may not be 'abridged on the plea that it may be exercised in some other place.'"[125] Broadcasters also claims that "every decision cited in the long history of this proceeding, whether in broadcasting, cable, telephone, or print, unhesitatingly concluded that blanket bans on indecency violate the First Amendment."[126]

86. We conclude that a 24-hour prohibition on broadcast indecency will not, in the words of the *Pacifica* Court, "reduce adults to hearing [or seeing] only what is fit for children."[127] The Court specifically referenced *Butler* in affirming the Commission's action in *Pacifica*, noting that "[a]dults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear these words." 438 U.S. at 750 n.28. *See also* 438 U.S. at 760 (Powell, J., concurring). Thus, the Court has recognized that the opportunity to obtain access to indecent material through other outlets is sufficient even if those outlets are not absolutely fungible with broadcasting.

87. In addition, indecent material is available on media that are largely indistinguishable, from the viewer's perspective, from broadcast television, although their characteristics facilitate restricting access to adults. Parties do not question that adults can obtain indecent material through cable television, wireless cable,[128] home satellite dishes,[129] or satellite master antenna television systems (SMATV)[130] and, soon in the future, DBS. [131] We note, for example, that as of July, 1990, 53.9 million house-

holds, or 58.6% of the total television households, subscribed to cable, and 71.3 million television households were passed by cable.[132] The individual who seeks indecent material via cable television need not leave his or her home to obtain the material. Furthermore, through the use of a lock-box or parental key, parents can control children's viewing, even permitting children to view indecent material if parents believe that doing so is in a child's best interest. AFA in its comments demonstrates that a significant number of R-rated movies are shown on cable. Accordingly, imposition of a 24-hour prohibition on broadcast indecency will not significantly interfere with the ability of adults to view or listen to indecent programming.

88. Moreover, *Butler* does not address the situation presented here, in which there is no feasible way to offer adults access to the medium without offering access to children. *Butler* concerned the sale *to adults* of books "tending to incite minors to violent or depraved or immoral acts manifestly tending to the corruption of the morals of youth." 352 U.S. at 381. Distributors of books or other media such as magazines, movies, and video and audio cassettes, with a salesperson behind the counter, have the means to control access by children at their point of sale or access. Thus, in the words of Justice Powell, "dissemination of this kind of speech to children may be limited without also limiting willing adults' access to it." *Pacifica*, 438 U.S. at 758 (Powell, J., concurring). Broadcasting, however, has no salesperson behind the counter or lockbox which parents may use to control access. Unlike other media, broadcasting is delivered directly into the privacy of the home and does not distinguish among recipients. Accordingly, "such a physical separation of the audience cannot be accomplished in the broadcast media. . . . [T]he broadcaster cannot reach willing adults without also reaching children." *Id.* at 758-759. *Butler* simply does not address the conflict between adults' right to obtain indecent material and the need to protect children from exposure to such material in the broadcast medium. We believe, however, that the established compelling interest in protecting children, coupled with the impossibility of separating children from adults in the broadcast audience, must outweigh the right of adults to view or to hear broadcast indecency, especially when adults can readily see or hear such material on widely available and readily accessible media which can separate children and adults. As Justice Powell said, *Butler*'s attentiveness to adults' rights "is not sufficiently strong to leave the Commission powerless to act" to control broadcast indecency. *Pacifica*, 438 U.S. at 760 (Powell, J., concurring).

G. Enforcement

89. The foregoing demonstrates that only a 24-hour prohibition would effectively serve to protect children from broadcast indecency. Nonetheless, although audience surveys and data demonstrate the likelihood that significant numbers of children may be found in broadcast audiences at all times of the day and night, in the future we will consider, on a case-by-case basis, evidence from a station charged with indecent broadcasting that the data concerning children's viewing or listening are not applicable in its specific market. In other words, we will permit the broadcaster to submit evidence illustrating that only "a few of the most enterprising and disobedient young people" are in the broadcast audience in the station's market at the time of the broadcast in question. In this regard, stations will not be required to show that children were not in the market audience on the specific date and at the specific time that the allegedly indecent program was aired (*e.g.*, Thursday, July 12, 1990 at 11:30 p.m.). Rather, stations will be permitted to demonstrate through ratings data or other probative evidence that children typically are not in the audience on the day and at the time in question (*e.g.*, Thursday nights at 11:30 p.m.). This policy will ensure that enforcement of the broadcast indecency statute will be narrowly tailored to situations in which there is in fact a risk that children are in the audience. We do not believe this requirement is unduly burdensome for a licensee.[133]

90. We note that in several prior instances, parties have responded to Letters of Inquiry or Notices of Apparent Violations with data which, they argue, demonstrate that few or no children were likely to have been listening to their particular station when the alleged indecent language was aired. Listeners and viewers, however, often switch indiscriminately from station to station and, particularly in the case of radio, "tune into a station generally without the benefit of a schedule of programs or warning as to potentially offensive content." *In re Pacifica*, 2 FCC Rcd at 2701, citing *Pacifica*, 438 U.S. at 760 n.2 (Powell, J., concurring). As a result, if children in a given market are in the broadcast audience, they may well tune into a particular station when "grazing" through different channels on their radio or TV set. Accordingly, to ensure that children are not exposed to indecent programming, we will require a station defending against a broadcast indecency complaint to demonstrate that children in fact are not in the broadcast audience for the entire market, not just the particular station, at the time it aired the allegedly indecent material.

IV. CONCLUSION

91. Based upon the information contained in the record and discussed in this *Report*, and our analysis of the applicable constitutional law as recently set forth by the Supreme Court in *Sable*, we conclude that the 24-hour prohibition on broadcast indecency is the most narrowly tailored means of protecting children from indecent material. In 1988 Congress, concerned with children's access to indecent material through broadcast stations, statutorily required this Commission to enforce the prohibition against indecent material on a 24-hour-a-day basis. In response to the Court's remand of the record in *ACT II*, in which the validity of the statute and the Commission's implementation of it was put at issue, we have conducted a full and fair proceeding to assess the validity of the 24-hour prohibition. In the *NOI*, we invited comment on a broad range of relevant issues and received comment on these and additional issues that responding parties wished to address. Over 92,500 comments have been received in response to this *NOI*, the vast majority of which favor the 24-hour prohibition.

92. Congress and the courts have determined that indecent material is potentially harmful to children. The Commission's definition of indecency has been affirmed by the Supreme Court, and permits broadcasters to identify material that is indecent. Because data gathered in this proceeding establish that children are in the broadcast audience at all times of the day and night, we do not believe that a channeling mechanism will accomplish the

compelling governmental purpose of protecting children. Adults, on the other hand, have other means to access such material should they so desire.

93. To comply with *Sable's* requirement that the means to accomplish the governmental interest be tailored as narrowly as possible, we have decided, when enforcing the 24-hour prohibition, to consider on a case-by-case basis any information that children are not in the broadcast audience in the market of the station accused of airing indecent material. This policy, we believe, will ensure that enforcement actions are taken only against those stations that broadcast indecent material when children are in the audience.

V. ORDERING CLAUSES

94. Accordingly, IT IS ORDERED, That the late filed reply comments of AFA ARE ACCEPTED.

95. IT IS FURTHER ORDERED, That upon release, the General Counsel IS INSTRUCTED to submit this *Report* to the U.S. Court of Appeals for the District of Columbia Circuit in response to the remand of the record in *Action for Children's Television v. F.C.C.*, No. 88-1916.

96. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] No. 88-1916 (D.C. Cir. Sept. 13, 1989).

[2] The Commission's 1989 appropriations law states: "By January 31, 1989, the Federal Communications Commission shall promulgate regulations in accordance with section 1464, title 18, United States Code, to enforce the provisions of such section on a 24 hour per day basis." *Making Appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies for the Fiscal Year Ending September 30, 1989, and for Other Purposes*, Pub. L. No. 100-459, § 608, 102 Stat. 2186, 2228 (1988).

[3] Enforcement of the FCC regulation promulgating the 24-hour prohibition, codified at 47 C.F.R. § 73.3999 (1989), was stayed pending judicial review by the court in *ACT II*.

[4] 109 S. Ct. 2829 (1989).

[5] 4 FCC Rcd 8358 (1989).

[6] We received over 92,500 formal and informal responses to our *NOI*. Almost 88,000 informal letters supported a 24-hour prohibition, while approximately 4,500 letters opposed it. Formal commenters are listed in Appendix A, and the informal comments have been placed in the docket file. American Family Association *et al.* (AFA) filed its reply comments one day late. In the interest of assembling a full and complete record, and the lack of prejudice resulting to any party, we will accept those comments.

[7] *See* 47 U.S.C. §§ 312(a)(6) and (b), 503 (b)(1)(D) (1988).

[8] The Commission's definition of indecent language remains "language that describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *Pacifica Foundation*, 56 FCC 2d 94, at 98, 100 (1975). In our *Reconsideration Order* we explained that we separately consider the nature of the material involved and the time of broadcast because the time of broadcast is pertinent to whether the broadcast is actionable, rather than to whether it is indecent. *See* 3 FCC Rcd 930, 936 n.6 (1987); *ACT I* at 1338 n.8.

[9] 390 U.S. 629 (1968). In *Ginsberg*, the Court upheld a state statute that prohibited the sale to minors (17 and under) of sexual material deemed by the legislature to be obscene as to children.

[10] *See* n.2, *supra*.

[11] 47 CFR § 73.3999 (1989). *See Order in Enforcement of Prohibitions Against Broadcasting Obscenity and Indecency in 18 U. S. C. § 1464*, 4 FCC Rcd 457 (1988).

[12] Morality in Media (MIM) Comments at 23-32; Salem Communications Corporation and Focus on the Family (Salem) Reply Comments at 24-27.

[13] *ACT I* at 1343 n.18, quoting *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 540 (1980).

[14] *Cf. United States v. Grace*, 461 U.S. 171, 177 (1983) (regulation must be "narrowly drawn to accomplish a compelling governmental interest"); *Consolidated Edison Co. of New York v. Public Service Commission of New York*, 447 U.S. 530, 540 (1980) (regulation must be "a precisely drawn means of serving a compelling state interest"); *Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980) (law invalid because state's interest could be "served by measures less intrusive"); *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 800 (1985) (state can exclude speakers if "compelling state interest" and "narrowly drawn exclusion"); *Perry Education Association v. Perry Local Educators Association*, 460 U.S. 37, 45 (1983) (government must show that "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end"); and *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) ("closely drawn to avoid unnecessary abridgment," quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam)).

[15] *See ACT I* at 1343 n.18.

[16] Capital Cities/ABC (ABC) Comments at 28; Pacifica Foundation *et al.* (Pacifica) Comments at 32; P.E.N. American Center *et al.* (PEN) Comments at 9; Cohn and Marks (C&M) Comments at 20; and Comments submitted jointly by a number of broadcasters and organizations, including the National Association of Broadcasters, CBS Inc., Action for Children's Television, and the American Civil Liberties Union *et al.* (hereinafter collectively referred to as "Broadcasters") at 19, 23.

[17] MIM Reply Comments at 15-16.

[18] MIM Comments at 4-5.

[19] Broadcasters Comments at 5-6.

[20] MIM Comments at 12-14; AFA Comments at 2-7; Salem Reply Comments at 49-53.

[21] C&M Comments at 19 n.28. C&M's reference to absorbing the "first blow" derives from *Pacifica*, 438 U.S. at 749: "To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow." *See also* n.29, *infra*.

[22] There seems to have been some understandable confusion in the past as to the extent to which we relied on both of these two purposes -- supporting parental supervision and promoting the well-being of youth -- in serving the compelling interest of protecting children. *Compare, e.g., Reconsideration Order*, 3 FCC Rcd at 930 ¶ 3, with 3 FCC Rcd 931 ¶ 11. The court in

ACT I understood the Commission's position as based solely on its interest in supporting parental authority. *ACT I*, 852 F.2d at 1343. However, the Supreme Court in various cases, including *Ginsberg*, *Pacifica*, and *Sable*, has recognized a broader governmental interest in protecting children which goes beyond merely supporting parental supervision, and Congress specifically referenced this broader interest in directing the adoption of the 24-hour prohibition on broadcast indecency. *See* 134 Cong. Rec. S9912 (daily ed. July 26, 1988) (statement of Sen. Helms). We take this occasion to state that, consistent with Congress' direction, the broader view more accurately reflects what we seek to accomplish -- specifically, to support parental supervision and to promote generally the well-being of youth.

[23] Broadcasters Comments at Appendix A.

[24] AFA Reply Comments at Appendix 2. In defining pornography, Victor B. Cline, author of the study, noted that "something could be regarded as 'pornographic' but still not be legally obscene." *Id.* at 1.

[25] *See Telephone Decency Act of 1987*, Hearing Before the Subcommittee on Telecommunications and Finance of the U.S. House of Representatives Committee on Energy and Commerce, 100th Cong., 1st Sess. (Serial No. 100-99, Sept. 30, 1987) at pp. 22-26, 27, 63-64, 96-97; *Cable - Porn and Dial - A - Porn Control Act*, Hearing Before the Subcommittee on Criminal Law of the United States Senate Committee on the Judiciary, 99th Cong., 1st Sess. (July 31, 1985, Serial No. J-99-46) at pp. 103, 135-138.

[26] *See* Pub. L. 98-214, 97 Stat. 1469 (1983); amended by Pub. L. 100-297, 102 Stat. 424 (1988); further amended by Pub. L. 101-166, 103 Stat. 1159, 1192-1194 (1989).

[27] *See United States v. Various Articles of Obscene Merchandise, Schedule No. 2102*, 709 F.2d 132 (2d Cir. 1983). Other movies found not to be obscene included "Insatiable," "Star Virgin," "The Opening of Misty Beethoven," and "Inside Desiree Cousteau." The court described these movies as "examples of hard-core pornography, describing and depicting a wide range of scenes of explicit sex on the part of adults, singly and in groups, including detailed portrayals of genitalia, sexual intercourse, fellatio, and masturbation." 709 F.2d at 134. *See also Hermann v. United States*, 259 A.2d 347 (D.C. 1969), holding the movie "Threes, Menage a Trois" not to be obscene. The movie was described by the court as depicting "a succession of more or less disconnected scenes portraying or suggesting sexual activities including repetitive self-fondling of female nipples, lesbian-like stroking, some displays of female genital areas and pubic hair, and poses suggestive of cunnilingus between a fully dressed man and a partly dressed woman." 259 A.2d at 348.

[28] Examples of the patently offensive indecent material broadcast by some stations are included in Appendix B.

[29] In his concurrence, Justice Powell noted that "broadcasting -- unlike most other forms of communication -- comes directly into the home, the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds. . . . Although the First Amendment may require unwilling adults to absorb the first blow of offensive but protected speech when they are in public before they turn away, . . . a different order of values obtains in the home." 438 U.S. at 759 (Powell, J., concurring in part) (citation omitted).

[30] The Court has recognized the government's substantial interest in protecting the privacy of the home in non-broadcast contexts as well. *See, e.g., Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (upholding a narrowly-tailored ban on picketing a specific residence and stating that "we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom"); *Carey v. Brown*, 447 U.S. 455, 471 (1980) ("The State's interest in protecting the well-being, tranquility and privacy of the home is certainly of the highest order in a free and civilized society"); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 77-78 (1983) (Rehnquist, J., concurring) ("We have often recognized that individuals have a legitimate 'right to be left alone' in the privacy of the home . . . the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds").

[31] Our initial definition of indecency included the language "when there is a reasonable risk that children may be in the audience." *Pacifica*, 56 FCC 2d at 98. Starting with our 1987 decisions, however, we have treated the nature of the material involved and the presence of children in the audience as separate issues because the question whether there is a reasonable risk of children in the audience is "more pertinent to . . . whether a broadcast is 'actionable' under 18 U.S.C. § 1464 than to whether it is indecent." *Reconsideration Order*, 3 FCC Rcd at 936 n.6. *See supra*, n.8.

[32] *See, e.g.*, MIM Reply Comments at 22-25; Salem Reply Comments at 10-21; and AFA Reply Comments at 3-7.

[33] *See, e.g.*, Broadcasters Comments at 35-40; PEN Comments at 11-16; Post-Newsweek Stations (Post) Comments at 1-2; ABC Comments at 19-21; C&M Comments at 7-16; and Cox Comments at 9-15.

[34] PEN Comments at 16-20; Pacifica Comments at 13-20; Post Comments at 2-5; and KDVS Comments at 11-14.

[35] Broadcasters Comments at 40; ABC Comments at 36-41; and Arizona Board of Regents *et al.* (Joint Parties) Comments at 22-23.

[36] Broadcasters Comments at 44.

[37] We also note that the courts already have determined that our definition of indecency is not unconstitutionally vague. *See ACT I* at 1338-1339.

[38] Section 1464 states that "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both." 18 U.S.C. § 1464.

[39] *See, e.g.*, AFA Comments at 13; Bonneville International Corporation (Bonneville) Comments at 5; and Salem Reply Comments at 21-24.

[40] *See* Broadcasters Comments at 26-29. *See also* Cox Enterprises (Cox) Comments at 26-28 and PEN Comments at 20-23.

[41] Broadcasters Comments at 13-17 and Appendix A; Broadcasters Reply Comments at 10-12; Pacifica Comments at at 30-31; and ABC Comments at 23-28.

[42] In enacting the 24-hour prohibition, Senator Helms, the author of the legislation, relied upon data regarding children 12 to 17 in arguing for enactment of the prohibition and, therefore, intended for it to apply to this age category. 134 Cong. Rec. S9912 (daily ed. July 26, 1988) (statement of Sen. Helms).

[43] *See North Haven Board of Education v. Bell*, 456 U.S. 512, 526-527 (1982); *Steiner v. Mitchell*, 350 U.S. 247, 254 (1956) (remarks of legislation's sponsor is an authoritative guide to statute's construction and deserves to be accorded substantial weight). *See also National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612, 640 (1967) ("It is the sponsors that we look to when the meaning of the statutory words is in doubt.").

[44] The Court in *ACT I* noted that the Commission in a 1976 legislative proposal had recommended that the regulation of broadcast indecency be directed to protecting children under 12. *See* 852 F.2d at 1342, citing 122 Cong. Rec. at 33,367 n.119. At the time, we made this recommendation for two reasons. First, we proposed that broadcasters could defend against an indecency complaint by showing that they had made efforts to minimize

the risk of exposure to children. Including 18-year olds in the definition of children, we feared, would deprive broadcasters of this defense because of the difficulties inherent in effectively shielding 18-year olds from indecent programming. Second, we observed that age 12 "is the accepted upper limit for children's programming in the industry and at the Commission." 122 Cong. Rec. at 33,367 n.119; *see* 122 Cong. Rec. at 33,364 (Sept. 29, 1976).

However, now outside the confines of that debate and on further examination, we conclude that the appropriate "upper limit for children's programming" differs from the appropriate upper limit for protecting children from exposure to indecent material. To the extent the public interest requires broadcasters to offer age-specific or other special programming for children, that interest subsides when the child reaches an age, such as 12 years old, when general interest programming serves his or her needs. In contrast, the wide usage of the age of 17 and under in other federal and state laws intended to protect children from access to sexually explicit material demonstrates the general acceptance of the need to protect children older than 12 from exposure to such material. Moreover, our recommendation to Congress in 1976 simply struck a different balance between the need to protect children and the rights of adults to see or hear indecent matter from that struck by Congress in 1988 when it directed the Commission to enforce the prohibition on indecent broadcasting 24 hours a day.

[45] Similarly, in enacting the 24-hour prohibition on broadcast indecency, the statute's author expressed concern regarding the pervasiveness and accessibility of the broadcast medium. 134 Cong. Rec. S9912 (daily ed. July 26, 1988) (statement of Sen. Helms).

[46] *NOI* at 8361.

[47] *Id.* Additional data submitted by AFA illustrates the pervasive nature of television, using the Chicago television market as an example. Chicago has 5 VHF and 3 UHF TV stations, of which most broadcast at least 20 hours a day, 7 days a week. As a result, for over 80% of all hours in a week, day or night, there are at least 8 different programs being broadcast simultaneously. In a typical 168 hour broadcast week, there are over 1,120 hours of programs broadcast. AFA Comments at 41-42.

[48] *Id.*

[49] *Id.* at 8361.

[50] *Id.*

[51] MIM Comments at 42-62.

[52] *NOI* at 8361.

[53] Bonneville Comments at 6-7. Bonneville's statistics are from Spring 1989 Arbitron Radio Ratings (Metro AQH M-F midnight - 1:00 a.m.).

[54] Salem Reply Comments at Exhibit 1.

[55] NRB Reply Comments at Exhibit 2.

[56] Mr. Stern's morning radio show was the subject of one of the Commission's 1987 indecency decisions. *See Infinity Broadcasting Corp. of Pennsylvania*, 2 FCC Rcd 2705 (1987).

[57] Broadcasters Comments at 26 n.65, citing a poll by the Gallup Organization, WXRK Radio, Special Listenership Study (Dec. 1989).

[58] MIM Reply Comments at 20.

[59] KDVS Comments at 7-9.

[60] KDVS Reply Comments at 3-4.

[61] *Id.* at 5-6.

[62] Pacifica Comments at 23-25 and Attachment 4.

[63] Broadcasters Comments at 26.

[64] *NOI* at 8361 and Appendix B, Tables 3 and 4.

[65] *NOI* Appendix B, Table 3.

[66] With regard to KDVS' concern that the Commission omitted estimates of the sampling error or relative standard error in the data presented in the *NOI*, the Commission does not attach the rating companies' descriptions of methodology with error and reliability estimates for their data. However, these descriptions are readily available in ratings reports, and do not suggest that this information is systematically skewed.

[67] *NOI* at Appendix B, Table 4.

[68] *NOI* at 8362 and Appendix C.

[69] USCC Comments at 5. We note that USCC admits that the results of its survey are not conclusive, and that it was unable to receive a full response to its survey. *Id.* at 5-6.

[70] KVDS Reply Comments at 4.

[71] Salem Reply Comments at Exhibit 2 and NRB Reply Comments at Exhibit 1, citing data from Arbitron *Television Market Reports* for the five markets for July 1989.

[72] Salem multiplies the 20,254,000 total population of 12 to 17 year olds cited in the *NOI* by 4.8% to arrive at 972,192 children in this age range. Salem Reply Comments at 65.

[73] *1990 Nielsen Report on Television* at 1.

[74] *NOI* at 8363.

[75] *Id.* at 32-34, Appendix C.

[76] MIM Reply Comments at 18-19.

[77] AFA Reply Comments at 8.

[78] AFA Comments at 38-39.

[79] *Id.* at n.55.

[80] USCC Comments at 5-6.

[81] *NOI* at 8361.

[82] Cable Communications Policy Act of 1984 § 624(d)(2), 47 U.S.C. § 544(d)(2).

[83] *See* 47 U.S.C.A. § 223 as amended by Pub. L. 101-66, 103 Stat. 1159, 1192-1194 (1989); *Regulations Concerning Indecent Communications by Telephone (Report and Order)*, FCC No. 90-230, adopted June 14, 1990.

[84] In reply comments, Broadcasters submit a list compiled by the Consumers Union of selected television models currently sold in the United States. Broadcasters claim that over 120 models are equipped with a channel blocking feature that prevents unauthorized access to channels. Broadcasters Reply Comments n.14, Appendix 5. Virtually all of the televisions on this list have at least a twenty-inch screen and, judging by the list price, appear to be color televisions. Broadcasters provide no data showing the market share held by these models. No commenters submitted evidence as to whether channel blocking devices for attachment to existing television sets are available. Furthermore, Broadcasters offer no information as to how channel blocking works, particularly whether a channel blocking feature completely prevents access to a particular channel or whether it may easily be circumvented. Moreover, most television sets used in homes today do not have any blocking mechanism. Finally, no party has submitted evidence regarding the feasibility of using televisions with channel blocking in this context, or of the market penetration of these televisions.

[85] Many letters submitted in this proceeding emphasized the impossibility of close supervision. Representative of these are the following five. Mrs. Barbara Gigous of Warsaw, Indiana, wrote: "I have two teenage boys who have their own walkmans and tape recorders. There is no way that I can know what they are listening to all the time." Donald and Sandra Lee of Irving, Texas stated: "As working parents, our children have access to television at times when neither my husband nor myself are available to screen their viewing. The radio is available every-

where they go and it is equally offensive. . . ." Yvonne Thomas of Boonsboro, Maryland, a public school teacher, wrote "Many children live alone with a television as both parents are working." Another teacher, Ann Davis of Shrewsbury, Pennsylvania, wrote: "I tuned in the radio about 6 A.M. to see if any of the schools had been delayed [due to inclement weather]. This was the station suggested at school to listen to. I heard the most foul language and sexual innuendos I'd ever heard in public. . . . I had to ask [my son] to leave the room saying that I would let him know when the announcement was made." Cheryl Mayer of Bronson, Michigan, reported: "As I was driving my four children to school one morning, around 7:30, I was appalled at what I heard on a radio station. . . . two D.J.'s were being very crude."

[86] Broadcasters Comments, Appendix C, Table 2.

[87] *NOI* at 8363 and Appendix B, Table 5 at 8376.

[88] *Id.*

[89] MIM Comments at 42-62; Salem Reply Comments at Exhibit 1; NRB Reply Comments at Exhibit 2; *see also NOI* at 8361 and Appendix B, Tables 3 and 4.

[90] KDVS Reply Comments at 3-4.

[91] *NOI* at Appendix B, Table 4.

[92] Salem Reply Comments at 65.

[93] *See* ¶¶ 19-21, *supra*.

[94] Broadcasters Comments at 21.

[95] *Id.* at 23.

[96] KDVS Comments at 7-8. KDVS submits data from a 1983 Arbitron survey of the San Francisco metropolitan area showing that teens comprise one to four percent of the total television broadcast audience during the day.

[97] AFA Comments at 36-37; Lynda Beams (Beams) Reply Comments at 8-9 and Exhibit G; Bonneville Comments at 8.

[98] *ACT I*, 852 F.2d at 1341.

[99] AFA Comments at 29. *See also* Salem Reply Comments at 63, note 92, in which Salem cites a 1990 Nielsen study showing that over 14% of VCR taping is done from 11:00 p.m. to 6:00 a.m., and over 50% of VCR recordings are made when the television is turned off.

[100] KDVS Reply Comments at 6.

[101] For this reason, we overrule the conclusion reached in the *Reconsideration Order*, 3 FCC Rcd 930 (1987), that time channeling is an effective means of controlling children's access to indecent broadcasting.

[102] Indeed, it appears that the most effective means for parents to actively supervise their children's listening and viewing activities is to remove all televisions and radios. This result not only is highly impractical, but also would deprive families of the many benefits of the broadcast media.

[103] *See* n.85, *supra*.

[104] *See* ¶¶ 57-64, *supra*.

[105] *See* Post Comments at 1-2; Cox Comments at 24-25.

[106] C&M Comments at 28-30.

[107] *NOI* at 8363 and n.44. The *Pacific* a Court noted, "Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content." 438 U.S. at 738.

[108] USCC Comments at 6; KDVS Comments at 1.

[109] AFA Comments at 46; Salem Reply Comments at 72.

[110] Beams Reply Comments at 10; Salem Reply Comments at 72; AFA Comments at 46.

[111] MIM Reply Comments at 30.

[112] Broadcasters Reply Comments at 9, n.17.

[113] Pacifica Comments at 21-23.

[114] AFA Comments at 44-46, n.65; Salem Reply Comments at 72, n.105; MIM Reply Comments at 35-36.

[115] We note that the broadcast in question in *Pacifica* was heard by a man while driving with his young son, and that the parent apparently missed the warning aired before the broadcast. *Pacifica*, 438 U.S. at 730.

[116] Salem Reply Comments at Appendix 18.

[117] KDVS Reply Comments at 7.

[118] NRB Reply comments at 13.

[119] *Butler v. Michigan*, 352 U.S. 380, 383 (1957). In striking down a state statute that prohibited the sale to adults as well as to children of books "tending to the corruption of the morals of youth," the Court held that the statute was not reasonably tailored to its expressed purpose. In this case, a book arguably within the prohibited category was sold to an adult, and the Court stated that the effect of the statute was to reduce adults to reading only what is fit for children.

[120] *See* Bonneville Comments at 8-9; AFA Comments at 49-52; AFA Reply Comments at 34-36.

[121] AFA Comments at Appendices 4 and 5. In addition, Appendix 3 lists over 200 titles of videotapes available through sexually-oriented magazines.

[122] Broadcasters Comments at 6. *See also* PEN Comments at 8-9.

[123] Broadcasters Reply Comments at 3. Six of the broadcasts mentioned by Broadcasters consisted of radio talk shows, and the seventh included a live telephone conversation.

[124] Broadcasters Comments at 8-9.

[125] Broadcasters Comments at 9, citing *Schneider v. State*, 308 U.S. 147 (1939).

[126] Broadcasters Comments at 9-10.

[127] *Pacifica*, 438 U.S. at 750 n.28.

[128] "Wireless cable" is a relatively new service that provides multiple channels of video entertainment and informational programming using microwave frequencies and special reception equipment. Currently there are 50 or more systems operating in the United States, and numerous additional systems are planned. *See* Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, Report, MM Docket 89-600 at 53 (released July 31, 1990, FCC 90-276).

[129] An estimated 2.8 million home satellite dishes are in use. *Id.* at 55.

[130] Approximately 500,000 viewers subscribe to SMATV service. *Id.* at 57.

[131] *See Id.* at 56.

[132] *See Broadcasting*, July 16, 1990, at 94.

[133] We note that broadcast licensees are obligated to know and to serve the special needs of children, *see Children's Television Programming*, 55 R.R.2d 199, 214 (1984), and as a result, they appear to be uniquely able to demonstrate that children are not present in the listening or viewing audience.

[134] MIM also filed further reply comments.

APPENDIX A

The following parties filed formal comments:

1. Action for Children's Television, American Civil Liberties Union, Association of Independent Television Stations, Inc., Capital Cities/ABC, Inc., CBC, Inc., Infinity Broadcasting Corporation, Motion Picture Association of America, Inc., National Association of Broadcasters, National Broadcasting Company, Inc., National Public Radio, People for the American Way, Post-Newsweek Stations, Inc., Public Broadcasting Service, Radio-Television News Directors Association, Recording Industry Association of America, The Reporters Committee for Freedom of the Press, and Society of Professional Journalists (Broadcasters).

2. American Family Association, Inc. and Children's Legal Foundation, Inc., submitted on behalf of American Family Association, Advent Christian General Conference, Baptist General Conference, Catholic Center, Christian Standard, Conservative Congregational Christian Conference, Children's Legal Foundation, Assembly of God, Associate Reformed Presbyterian, Central Presbyterian Church, Conservative Baptist Association, Diocese of Eau Claire, Evangelical Free Church of America, General Association of General Baptists, International Pentecostal Church of Christ, North American Christian Convention, Wesleyan Church, General Association of General Baptists, General Conference Mennonite Church, Missionary Church, and Open Bible Standard Churches (AFA).

3. Arizona Board of Regents for Benefit of the University of Arizona, Arkansas Educational Television Commission, Board of Regents of the University of Houston System, Board of Trustees of the University of Illinois, Council for Public Television, Channel 6, Inc., Greater Dayton Public Television, Inc., Maryland Public Television, Milwaukee Area District Board of Vocational, Technical and Adult Education, Nebraska Educational Telecommunications Commission, The Ohio State University, Public Television 19, Inc., The Regents of the University of New Mexico and the Board of Education of the City of Albuquerque, New Mexico, St. Louis Regional Educational and Public Television Commission, The University of Nebraska, WITF, Inc., and WSKG Public Telecommunications Council, in a pleading entitled "Joint Comments of Noncommercial Parties" (Joint Parties).

4. Bonneville International Corporation (Bonneville).

5. Capital Cities/ABC, Inc. (ABC).

6. Cohn and Marks Law Firm (C&M).

7. Cox Enterprises, Inc. (Cox).

8. Marc Dyer (Dyer).

9. Evangelical Free Church of America (Evangelical).

10. Gospel Opportunities Inc. (Gospel).

11. Kennedy Broadcasting, Inc. (Kennedy).

12. Morality in Media, Inc. (MIM).

13. John W. Olivo, Jr. (Olivo).

14. Pacifica Foundation, the National Federation of Community Broadcasters, P.E.N. American Center, and Allen Ginsberg (Pacifica).

15. P.E.N. American Center, William S. Burroughs, Allen Ginsberg and Michael McClure (PEN).

16. Post-Newsweek Stations, Inc. (Post).

17. United States Catholic Conference (USCC).

18. University of California Radio Network and Station KDVS-FM (KDVS).

The following parties filed formal reply comments:

1. Broadcasters.

2. AFA.

3. American Academy and Institute of Arts and Letters statement.

4. Lynda Beams (Beams).

5. Central Communications and Electronics, Inc. (Central).

6. City Lights Booksellers & Publishers, Sandra Lee Golvin, David H. Halperin, Eileen Myles, Ron Padgett and Patrick Zale (City Lights).

7. Allen Ginsberg.

8. Barbara M. Hattemer (Hattemer).

9. Kenneth C. Hill.

10. KDVS.

11. MIM.[134]

12. National Religious Broadcasters (NRB).

13. PEN.

14. Salem Communications Corporation and Focus on the Family (Salem).

APPENDIX B

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
June 18, 1990

Released: June 26, 1990

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Gregory P. Barber, President
Narragansett Broadcasting Company of California, Inc.
Licensee, Radio Station KSJO(FM)
1420 Koll Circle
San Jose, CA 95112

Dear Mr. Barber:

This letter constitutes a Notice of Apparent Liability for a forfeiture pursuant to Section 503(b) of the Communications Act of 1934, as amended.

On August 24, 1989, we asked for your comments concerning complaints received by the Commission alleging that portions of the "Perry Stone Show" (transcripts of which are attached) broadcast by KSJO(FM), San Jose, CA, contained indecent material. The broadcasts at issue occurred from 7:00 to 8:00 a.m. on October 19, 20, 25, 27, 28 and November 10; from 8:00 to 9:00 a.m. on November 4; and from 9:00 to 10:00 a.m. on October 31 and November 10 and 14, 1988.

Your September 21, 1989, response to our letter of inquiry concerning these broadcasts advises, for background purposes, that you discharged Perry Stone from KSJO on March 14, 1989, and immediately put into practice your decision to cease broadcasting the kind of language and "shock" humor that generated the complaints against Perry Stone's program. You also advise that you met with some of the complainants in May and June 1989 and issued a news release and a public apology with respect to the Perry Stone Show prior to any Commission inquiry regarding the matter.

You describe KSJO management's efforts, prior to Perry Stone's dismissal, to comply with Commission rulings regarding indecency, and state that management first became aware of the particular broadcasts here at issue when complainants submitted transcripts to the station in November 1988. You concede that the broadcasts in question were "tasteless" and may have been "offensive to many listeners," but in view of strong listener support for the Perry Stone Show and your uncertainty about how to apply Commission standards, you did not suspend the programming until you had determined that Perry Stone was "insufficiently responsive to program direction and could not be persuaded to satisfactorily conform to KSJO guidelines." Citing the "largely unsettled" state of the law on actionable indecency, you assert an inability, continuing into the present, to determine whether the particular broadcasts, especially those involving double entendre, violated the Commission's articulated indecency standards. In addition, based on your belief that "parents would normally be in a position to supervise their children's radio listening" before 9:00 a.m., you question whether the seven broadcasts occurring before that hour are actionable even if they were indecent.

Section 1464 of Title 18 of the United States Code prohibits utterances of "any obscene, indecent or profane language by means of radio communication." Pursuant to Sections 312(a)(6) and 503(b)(1)(D) of the Communications Act, the Commission has statutory authority to take appropriate administrative action when licensees broadcast material in violation of 18 U.S.C. § 1464. The Commission has defined indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the Supreme Court upheld the Commission's authority to regulate indecent broadcasts and rejected the argument that the Commission's definition, essentially unchanged from the one used today, was unconstitutionally vague. The United States Court of Appeals for the District of Columbia Circuit has upheld the Commission's authority to restrict, using the same definition of indecency, the broadcast of indecent material when there is a reasonable risk that children may be in the audience. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) (" *ACT* ").

We find that the subject broadcasts all fit squarely within the definition of indecency quoted above. Even in the cases of double entendre, not only was the language understandable and clearly capable of a specific sexual or excretory meaning but, because of the context, the sexual and excretory import was inescapable. *See Infinity Broadcasting Corp. of Pa.*, 2 FCC Rcd 2705 (1987), *recon.*, *Infinity Broadcasting Corp.*, 3 FCC Rcd 930 (1987), *aff'd in part and remanded in part sub nom. Action for Children's Television v. FCC*, *supra*. As the broadcasts occurred during daytime hours, they are legally actionable. Indeed, in *ACT*, the Commission's application of its indecency standard to broadcasts aired between 6:00 and 10:00 a.m. was specifically upheld regarding the broadcast at issue in *Infinity*, *supra*. With respect to KSJO's subsequent efforts to avoid the broadcast of indecent material, the Commission generally considers prompt and effective remedial action by a licensee as mitigative in determining the appropriate sanction level in an enforcement proceeding. In this case, however, we do not believe that the licensee's actions, while perhaps ultimately effective, were such as should affect the sanctions imposed for the broadcasts cited in this letter. Your letter states, for example, that the specific incident that triggered Stone's suspension was unrelated to the Commission's indecency policies.

Thus, it appears that on the above-referenced dates in October and November 1988, at the times stated, Station KSJO(FM) violated 18 U.S.C. § 1464 by airing indecent programming at times when there was a reasonable risk that children may have been in the audience. Accordingly, pursuant to Section 503(b) of the Communications Act, Narragansett Broadcasting Company of California, Inc., is hereby advised of its apparent liability for a forfeiture of twenty thousand dollars ($20,000). The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Act.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. § 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

This letter was adopted by the Commission on June 7, 1990.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

Attachments
cc: Peter D. O'Connell, Esq.

Radio Station KSJO-FM, San Jose, CA
The Perry Stone Show 6:00 to 10:00 a.m.
Tape #1 Side "A"

1. 10/25/88 7:00 - 8:00 a.m.

CA: Caller

PS: Perry Stone

CA Hello

PS Sophie, baby.

CA What do you want?

PS Sophie baby, I love 'ya. You know how much I love you?

CA I love you too, Perry.

PS You know how much I appreciate you?

CA What do you want?

PS I love you. I'd love to, I'd love to lick the matzo balls right off your butt. As a matter of fact, I'd put it right there in the middle.

CA Perry, you didn't get enough sleep last night. That's why you're talking like this.

PS I'd like to have a smorgasbord in your butt. I'd like to have matzos in there with borsch, everything. I'd just have a buffet.

CA You wouldn't find your way out, darling.

PS I know that.

2. 10/20/88 7:00 - 8:00 a.m.
Song: To the tune of the "Beverly Hillbillies" theme.

Come a listen to story about a man named Boas, a poor politician that barely kept his winky fed, then one day he's poking a chick and up from his pants came a bubbling crude. Winky oil. Honey pot. Jail bait. Well, the first thing you know, old Roger's doing jigs. Some kin folks said, "Rog, move away from there." Jail bait is the place where I really want to be. So he loaded up his winky and he did it with Beverly. Big breasts. Only 15 years old. Going to jail. Well, now it's time to say goodbye to Boas and his friends and they would like to thank you folks for kindly dropping in. You're all invited back to this jail serenity and hope you bring some chick called Dorothy.

Radio Station KSJO-FM, San Jose, CA
Tape #1 Side "B"

3. 11/4/88 8:00 - 9:00 a.m.
11/10/88 9:00 -10:00 a.m.

Song: Sore Pussy

My pussy cat was scratching out on the back door, scratched so long, poor pussy got sore. Sore pussy, sore, pussy, just a friendly little cat. Friendly little cat. My pussy cat was sitting out on the front step, sat so long poor pussy got wet. Wet pussy, sore, wet, pussy, just a friendly little cat. Friendly little cat. My pussy cat was playing out on the back lot, played so long, poor pussy got hot. Hot pussy, sore, wet, hot, pussy, just a friendly little cat. Friendly little cat. My pussy cat was rocking in the rocking chair, rocked so long he lost his hair, bald pussy, sore, wet, hot, bald, pussy, just a friendly little cat. Friendly little cat. My neighbor and I, out at the clothes line, I said to my neighbor, won't you look at mine, my pussy, sore, wet, hot, bald, pussy, just a friendly little cat. Friendly little cat. My neighbor sold my kitty but I did see, I said to my neighbor set my pussy free. Free pussy, sore, wet, hot, bald, free, pussy, just a friendly little cat. Friendly little cat. Here kitty, kitty, kitty, kitty, kitty, ahhh, nice pussy.

4. 11/10/88 7:00 - 8:00 and 9:00 -10:00 a.m.
11/14/88 9:00 - 10:00 a.m.

PS All right, we got one contestant hanging on the line and play my three bongs, if you want. If you want to participate, 408-575-1800 from ninety-two three, KSJO.

Music Coming soon. S and M Pictures presents, Pecker. Pecker, it's hiding in the bush. Pecker, he's hiding in your pants, waiting to come out. (music) Listen to me, Chief, it's Pecker, it's coming. Pecker is getting bigger all the time and once it becomes big, it's going to be hard to stop it. Stop spanking the monkey, this is serious. This Pecker, he's dangerous. Arghh. Woody Woodpecker is back but this time he's really peeved. He's a peeved Pecker who had a piper pick. No, Pecker is coming. Whew. God, I'm lonely. Hey, what's that crawling up my pants? What is that? (music) Oh. Oh. (unintelligible) Oh, I just simply love cleansing myself. Oh, Jesus this is beautiful, au naturel, oh, I think I've dropped the

soap. Let me bend over here. What's that? Something feels strange on my back. What is that? (music) Oh. Oh. This Pecker is long and hard and waiting to pounce from the bush. This weekend, check it out.

Radio Station KSJO-FM, San Jose, CA

5. 10 27 88 7:00 - 8:00 a.m.

PS Contestant number two, you're on the air. Identify yourself.

CA I'm Eric.

PS Yes.

CA From Campbell.

PS Yes, Eric.

CA You know what relative humidity is?

PS Relative humidity? What?

CA It's the sweat running down your sister's back when you're doing her doggie style.

PS Ohhh.

6. 10 28 88 7:00 - 8:00 a.m.

PS Christian Blasey, the third. And classical music lovers, through this limited time offer, you can have the world's best loved classics performed by the original composers but with one exception, these true classics are performed in complete fellatio. You get Bach.

FV Ohh. Oh, yeah you're what I've been looking.

PS The immortal Chopin.

FV Oh. Oh. Oh. You like that baby, oh yeah.

PS Yes, these timeless classics are performed in true Dolby stereo with complete fellatio. You can surround your entire living room with fellatio movements. You and your family will lick their lips just waiting for fellatio. Order today and get a free Beethoven bib.

FV Oh, yeah, you really like that don't you baby.

Radio Station KSJO-FM, San Jose, CA

7. 10 31 88 9:00 - 10:00 a.m.

PS: Perry Stone

MV: Male Voice

FV: Female Voice

PS All right man. Thank you.

MV When you were born maybe your parents were just too lazy. Now that you're all grown up and you're a healthy American male you have to suffer the consequences.

FV Ohh, it's an uncircumsized one. Ohh, how gross.

MV Yes, over 65 million healthy American males suffer from uncircumsized ones. Unlike normal men, uncircumsized males have to constantly worry about pulling back their foreskins every time they have to use it. Now, you don't have to worry again because Rodgo proudly presents the foreskin garage opener. It's a computer chip that fits snugly on the tip of your thing and included is a remote control that you keep in your pocket. You use it just like a garage opener. Open it up when you have to use your thing. (Mechanical sound effect) Watch the foreskin get pulled back in a comfortable, relaxed fashion. Now, you're ready for some serious pounding. (Metal hammer sound effect) So, never worry again about foreskin. Pick up Rodgo's new foreskin garage opener. You'll be glad you did.

MV Oh, wow. I think she's ready to do it. Hey, you ready to do it? Yeah, I think she's ready to do it. (Mechanical sound effect)

FV Yeah. Oh, yeah, you are.

MV Thank you foreskin garage door opener.

8. 10 19 88 7:00 - 8:00a.m.

MV Oh, this one is for you Trish. If I had a rooster and you had a donkey and your donkey ate the feet off my rooster, what would you have?

TB I don't know. What would I have?

CA Two feet of my cock in your ass. (music payoff) (laughter)

PS Of course, we're speaking about those farm animals again, just so we can clear it up.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Pacifica Foundation, Inc.
d/b/a PACIFICA RADIO
Los Angeles, California

Licensee of KPFK-FM
Los Angeles, California

MEMORANDUM OPINION AND ORDER

Adopted: April 16, 1987 **Released: April 29, 1987**

By the Commission: Commissioner Quello concurring and issuing a statement.

1. The Commission has before it two complaints with respect to certain programming aired on KPFK-FM, Los Angeles, California, alleging violations of Title 18, United States Code, Section 1464. Under Section 503(b)(1)(D) of the Communications Act, the Commission has authority to impose a forfeiture or other sanction upon a licensee who has violated Section 1464. At issue is whether the broadcasts constitute a violation of Section 1464, and if so, what penalties, if any, should be imposed upon licensee Pacifica Foundation, Inc. for such violations.

I. BACKGROUND

2. On July 10, 1986, and on September 8, 1986, the Commission received complaints that certain programming (more fully described below) aired on Station KPFK-FM, Los Angeles, CA, violated Title 18, United States Code, Section 1464. That section of the United States Criminal Code provides that: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both."

3. More specifically, on July 10, 1986, the Commission received a complaint alleging that on June 28, 1986, at approximately 7:45 p.m., local time, KPFK-FM aired a program entitled "Shocktime America" ("Shocktime, U.S.A.") which allegedly contained a narration and song lyrics utilizing words and phrases such as "eat shit," "mother-fucker" and "fuck the U.S.A." The complaint did not include a transcript or tape recording of the show, and did not indicate whether the use of the expletives described was repetitive.

4. On September 22, 1986, the Chief, Mass Media Bureau sent letter to Mr. Jack O'Dell, the Chairman of Pacifica Foundation, Inc., enclosing the above-described complaint letter and asking for Pacifica's comments. On October 21, 1986, the Commission received Pacifica's response. In that response Pacifica indicates that "Shocktime, U.S.A." is a live KPFK program that is produced by a Los Angeles-based performance art group. On the particular program in question, Pacifica indicates that one of the group's members made remarks that were not scripted and which members of the listening audience might well have found offensive. Furthermore, Pacifica asserts that as a result of this incident the other members of the group met and expelled the subject individual. Additionally, the licensee indicates that the program producers, in recognition that "the nature of this spontaneous commentary was so inappropriate," withdrew the program from KPFK. Pacifica expresses regret for the incident and states that it has re-emphasized to all program producers their responsibility to the station and to the listening audience.

5. On September 8, 1986, the Commission received a complaint alleging that on Sunday, August 31, 1986, between 10:00 and 11:00 pm, local time, KPFK-FM aired a program "I Am Are You?" ("IMRU") that featured excerpts from a play entitled "Jerker." The complaint alleged that these excerpts involved dramatic readings of sexual fantasies and contained language highly descriptive of sexual and excretory activities.

6. In its September 22, 1986, letter to Pacifica, the Chief, Mass Media Bureau also enclosed this complaint and asked for the licensee's comments. In its response, Pacifica states that the program "IMRU" is a regularly aired program directed to the gay population of Los Angeles. Pacifica represents that the play, "Jerker," deals with the issue of Acquired Immune Deficiency Syndrome and that the mood of the play is "the need to affirm life in the face of death." Pacifica contends that the complaint provided no context to the complained-of words and phrases and was, therefore, misleading. In an effort to comply with Commission advice in earlier decisions,[1] the following warning was broadcast prior to the commencement of "IMRU" on the night in question:

> The Supreme Court of the United States has directed that broadcasters must be especially aware of the effect of the use of so called "indecent" language during the hours when children may be listening. KPFK's policy is to allow the freest possible expression consistent with that ruling.
>
> The following program contains material which some listeners may find objectionable. If you would be disturbed by the use of such sensitive material, please tune out for the next . . . . . minutes.

7. Finally, Pacifica asserts that at the time the subject program was broadcast "children would not ordinarily be in the listening audience," and that Arbitron ratings confirm that KPFK's listening audience rarely consists of children. Pacifica also supplied a tape recording of the August 31, 1986, "IMRU" program.

II. DISCUSSION

8. Our task in this matter is to determine whether or not the material aired by KPFK-FM meets the legal test for indecency as articulated by the Commission in its *Pacifica* decision and affirmed by the United States Supreme Court. *Pacifica Foundation*, 56 FCC 2d 94 (1975), *aff'd sub nom. FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

9. In *Pacifica*, the Commission concluded that "indecent" matter proscribed under 18 U.S.C. Section 1464 is not identical to "obscene" matter. 56 FCC 2d at 97-98. In *Miller v. California*, 413 U.S. 15 (1973), the

Supreme Court found that the standard for obscenity is: 1) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; 2) whether the work depicts or describes in a patently offensive way sexual conduct specifically defined by applicable state law; and 3) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value. *Id.* at 24.

10. In *Pacifica* we found that indecent speech involves the description or depiction of sexual or excretory activities or organs in a patently offensive manner. Indecent language was described in the Supreme Court's *Pacifica* decision as speech that is "patently offensive as measured by contemporary community standards for the broadcast medium." *FCC v. Pacifica Foundation*, 438 U.S. at 732. Further, as noted by the Court, what is indecent "is largely a function of context" and cannot adequately be judged in the abstract. *Id.* at 742. In making this determination, the Court relied upon a nuisance rationale when it affirmed the Commission, and spoke of channeling indecent speech to a time when children were not likely to be in the broadcast audience.[2]

11. When making determinations as to whether certain speech is "indecent," we recognize and rely upon the Court's holding in *Pacifica* as setting forth the legal test for indecency. We do not, however, necessarily rely upon all aspects of the rationale initially articulated in the Commission's *Pacifica* decision, as upheld by the Court. For example, we no longer consider the argument of spectrum scarcity to provide a sufficient basis for this type of regulation. Rather, we rely upon and emphasize the continued validity of the nuisance rationale articulated by the Commission and endorsed by the Court. Furthermore, we do not believe that any purported diminished First Amendment rights of broadcasters justify more expansive restrictions than would apply to other media. On the contrary, restricting indecency in broadcasting is required by law, and we believe that the restrictions we apply herein are consistent with the First Amendment protection applicable to the print media.

12. As to the parameters of indecent material, the licensee of KPFK-FM argues that the holding in *Pacifica* limits a finding of indecency to deliberate, repetitive use of the seven words actually contained in the George Carlin monologue determined to be indecent in *Pacifica*. While Commission action subsequent to the *Pacifica* decision may have indicated this to be the Commission's position, we take this opportunity to state that, notwithstanding any prior contrary indications, we will not apply the *Pacifica* standard so narrowly in the future. We find that the definition of indecent broadcast material set forth in *Pacifica* appropriately includes a broader range of material than the seven specific words at issue in *Pacifica*. Those particular words are more correctly treated as examples of, rather than a definitive list of, the kinds of words that, when used in a patently offensive manner as measured by contemporary community standards applicable to the broadcast medium, constitute indecency.

13. While speech that is indecent must involve more than an isolated use of an offensive word, *see Pacifica Foundation*, 95 FCC 2d 750, 760 (1983), repetitive use of specific words or phrases is not an absolute requirement for a finding of indecency. If a complaint focuses solely on the use of expletives, we believe that under the legal standards set forth in *Pacifica*, deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency. When a complaint goes beyond the use of expletives, however, repetition of specific words or phrases is not necessarily an element critical to a determination of indecency. Rather, speech involving the description or depiction of sexual or excretory functions must be examined in context to determine whether it is patently offensive under contemporary community standards applicable to the broadcast medium. The mere fact that specific words or phrases are not *repeated* does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent.

14. It has long been held that the government may impose reasonable time, place and manner restrictions on speech,[3] so long as they are narrowly tailored to further a significant government interest. *Renton v. Playtime Theatres*, 106 S. Ct. 925 (1986); *Young v. American Mini - Theatres*, 427 U.S. 50 (1976). The time, place and manner restrictions that are constitutionally permissible will necessarily vary, however, based on the characteristics of the medium involved. Because of the physical characteristics of the print medium, it is easier to restrict the access of minors to indecent material by, for example, instituting a reasonable requirement that such material be placed behind store counters or under opaque covers and preventing its sale to minors. Movie theaters can likewise close their doors to minors. In these cases, children's access can be limited without affecting adult access.

15. This physical separability of adults from children, however, is generally not available in broadcasting. Broadcast material is available to anyone who has a radio or television. Accordingly, the only effective means of restricting the access of minors to indecent programming is to channel such programming to a time during which there is not a reasonable risk that children may be in the audience. Hence, it is the physical attributes of the broadcast medium, not any purported diminished First Amendment rights of broadcasters based on spectrum scarcity or licensing, that justify channeling of indecent material. Indeed, we believe that requiring indecent programming to be broadcast only at a time when there is not a reasonable risk that children may be in the audience is a reasonable and narrow time, place and manner restriction that is consistent with the same First Amendment protections afforded the print media.

16. In prior determinations related to the broadcast of indecent material, the Commission has indicated that such broadcasts may be legally permissible if they are aired after 10:00 pm and are preceded by a warning.[4] Current evidence concerning the presence of children in the broadcast audience, however, warrants a reevaluation of this position. Our evidence indicates that there is a reasonable risk that children are still in the audience at 10:00 pm, at least on weekends (when the program "IMRU" was aired).[5] Although the percentage of children in the audience declines as the evening hours progress, significant numbers of children remain in the audience on Sunday evenings as late as midnight. Studies indicate that approximately 112,200 children aged 12-17 are in the Los Angeles metro survey area radio audience per average quarter hour between 7 p.m. and midnight on Sunday night. *Arbitron Ratings - Radio*, Los Angeles, Fall 1986, Metro Survey Area, Sunday 7:00 p.m. - Midnight, Average Quarter Hour Estimate, Teens. Thus, we have determined that mechanistically relying on a specific time for broadcasting indecent material no longer satisfies the requirement that indecent material be channeled to a time when

there is not a reasonable risk that children may be present in the broadcast audience. With this standard in mind, we now address the specific broadcasts that are the subject of the complaints.

Shocktime, U.S.A.

17. It is uncontested that the June 28, 1986, edition of the "Shocktime, U.S.A." program contained the language at issue. However, we are unable to determine whether the broadcast was indecent within the meaning of 18 U.S.C. Section 1464, under the *Pacifica* standard, because we do not have sufficient information or evidence concerning this particular broadcast upon which to make a fair determination of indecency. The complainant has merely stated that four specific phrases were used during the course of the broadcast. Without additional information, we cannot determine precisely the context or whether the use of patently offensive speech was isolated.[6] Thus, we have no basis upon which to make the requested determination as to indecency.

18. Furthermore, given the circumstances under which the material at issue was aired (*i. e.*, it was live, spontaneous and unscripted), *and* the remedial action taken by Pacifica and the performance art group that produced "Shocktime, U.S.A.," even if we could determine that the broadcast was in fact indecent, we would decline to take action in this situation. The Commission has previously indicated that the isolated use of unplanned expletives during live coverage of news or public affairs programming will not necessarily be actionable so long as the licensee exercises reasonable judgment, responsibility and sensitivity to the public's needs and tastes to avoid patently offensive broadcasts. We believe that Pacifica has followed these guidelines with respect to "Shocktime, U.S.A." Accordingly, we will take no further action with respect to the June 28, 1986 program.

IMRU

19. We now turn to the "IMRU" broadcast of August 31, 1986. We have reviewed the tape of the program. That review reveals that the program commenced with an interview, by the host of "IMRU," of the director and two actors appearing in the Los Angeles production of the play "Jerker," and was followed by excerpts from the play itself. The play, which was characterized during the interview with its director, Michael Kearns, as being "blazingly erotic," concerned the telephone relationship of two men who had met accidently over the telephone, but never in person, apparently when one called a wrong number.

20. The conversations broadcast made extensive use of language that describes or depicts sexual or excretory organs or activities in a patently offensive manner. In the first of the three vignettes presented, the words "shit" and "fucking" were used repetitively. In addition, during the first vignette, one character says to the other:

> "Yeah, it was loving even if you didn't know whose cock it was in the dark or whose asshole you were sucking."

21. At another point, one of the characters states that he was in Vietnam and that after what he had seen there, no one could tell him that he was immoral if he loved "sucking ass." "taking piss from a guy's cock," or if he had "a quickie blow job in the Union Square men's room."

22. As the presentation moved to the second vignette, the scene shifted to one character's description of an anonymous sexual encounter in which he had participated. He was told by the listening character to "make it hot" and to keep in mind that he would be "playing with" himself while being told the story. That story contained the following language by way of example:

> "I'll give you the gentlest fuck west of the Mississippi."
>
> "We cuddled and played around a bit before he started working on my ass."
>
> "I remember he was kneeling between my legs and he worked my asshole with lube for the longest time – just gettin' it to relax so there was no tension, no fear."
>
> "He lowered himself on top of me and slid his dick in all the way, but so gently, so smoothly, there wasn't even a bit of pain."
>
> "His cock felt warm inside me – and full – so nice and full. So he began sliding his cock back and forth inside of my ass – but so gently, so gently."
>
> "I don't think I've ever had such a gentle, sensitive fuck before or after. Well, he must gone at it for twenty minutes at the very least, just slidin' his cock back and forth inside of my ass."
>
> "And then he whispered to me, 'You're gonna feel me come inside of you.' And I did. Man, I could feel the cum pulse up his shaft inside of my ass. I could count the pulses and it felt warm and good."

And later in the program this exchange:

> Actor 1: "You better get yourself ready for some brother-to-brother, sweaty, down and dirty pig sex, you understand?"
>
> Actor 2: "Yeah!"
>
> 1: "None of this nicey-nice, lovey-dovey stuff. I want to make you eat ass, suck my balls, and drink my piss like-you never have before. You get me?"
>
> 2: "Hot throbbing cocks, hard pounding muscles."
>
> 1: "You've got it."

23. We believe that the material contained in the aired portion of "Jerker," of which the foregoing is exemplary but by no means exhaustive, supports a finding that the licensee broadcast indecent material within the meaning of 18 U.S.C. Section 1464. The material describes sexual and excretory activities and organs in a patently offensive manner as measured by contemporary community standards for the broadcast medium. Notwithstanding the licensee's assertion, we do not believe the context dilutes or ameliorates the patently offensive manner in which the sexual activity was described.

24. We are unpersuaded by Pacifica's argument that "KFPK's listening audience rarely consists of children except where programs are specifically focused on them." First, we would point out that the test of indecency focuses on the *risk* of the presence of children in the audience. As we have stated previously, "While particular stations or programs are oriented to specific audiences, the fact is that by its very nature, thousands of others not within the 'intended' audience may also see or hear portions of the broadcast. Further, in that audience are very large numbers of children." *Eastern Education Radio*, 24 FCC 2d 408, 411 (1970) (footnotes omitted). Second, we note the Supreme Court's observance that radio listeners tune into a station generally without the benefit of a schedule of programs or warning as to potentially offensive content.' *FCC v. Pacifica Foundation*, 438 U.S. at 760 n.2 (Powell and Blackmun, JJ., concurring). Finally, we note that listeners often switch indiscriminately from station to station and are thus easily exposed to indecent material not properly channeled to a time during which there is not a reasonable risk that children may be in the broadcast audience.

25. Based upon our review of the material, we conclude that the "IMRU" broadcast falls within the ambit of indecency as prohibited by Section 1464 under the standards set forth herein. Thus, we have determined that at a minimum this material warrants restricting children's access. Given our finding that there is a reasonable risk of children remaining in the listening audience at 10:00 p.m. on Sundays, the fact that this program was broadcast at 10:00 p.m. with a warning does not render it permissible. However, because prior Commission actions have indicated that airing programs containing indecent material at 10:00 p.m. might in certain cases be permissible,[8] we hereby limit our action to warning you and all other broadcast licensees that this material would be actionable under the indecency standard as clarified today.[9]

26. We do not decide here whether, based upon the applicable local community standards, the subject material also meets the tests for obscenity set forth in *Miller*.[10] We do believe, however, that there is sufficient possibility of such a finding. We are therefore directing the General Counsel to forward the complaint and tape recording of the subject "IMRU" program to the Department of Justice for its consideration as to whether a criminal prosecution pursuant to 18 U.S.C. Section 1464 is appropriate.

27. ACCORDINGLY, IT IS ORDERED, That the General Counsel shall forward the complaint and the tape recording of the subject "IMRU" program, along with a copy of this Order, to the Department of Justice for its consideration as to whether a criminal prosecution pursuant to 18 U.S.C. Section 1464 is appropriate.

28. IT IS FURTHER ORDERED, That the Mass Media Bureau will send a copy of this Memorandum Opinion and Order to the licensee at its address of record and to the persons who filed the complaints relating to the "Shocktime U.S.A." and the "IMRU" broadcasts.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

CONCURRING STATEMENT OF COMMISSIONER JAMES H. QUELLO

Re: Complaints Against Pacifica Foundation, Inc Licensee of Station KPFK-FM, Los Angeles, CA, Regarding Allegedly Obscene or Indecent Broadcasts.

In 1975, I concurred with the Commission's *Pacifica* decision stating:

> I am concerned that our new standard for indecent language is adulterated to the extent that it becomes an invitation to a few broadcasters to seize on the late evening hours as a showcase for similar types of garbage programming under the guise of literary, artistic, political or scientific value. They will note that the audience is composed of a minimum of children, and their preprogramming *caveats* will be considered to be sufficient warning for the unsuspecting listener. Then this Commission will sooner or later be faced with judging the content of such programming on the merits under the standard adopted today.

Pacifica Foundation Station (WBAI), 56 F.C.C.2d 94, 103 (1975) (Quello concurring).

As I predicted, we are confronted with a licensee that has presented obviously indecent material, yet followed our standards for channeling so called indecency into late evening hours. The language in the program, entitled "Jerker" is patently indecent and probably obscene. I find it difficult to believe that any licensee would reasonably believe such language to be permissible under 18 U.S.C. Sec. 1464.

I always have believed myself to be a strong advocate of the First Amendment. If there were any connection between such language and free and open discussion of public issues, then I would be the first to defend its use. On matters of public importance, open and robust discussion of issues is integral to the operation of our system of government and an informed citizenry, therefore, entitled to the most exacting degree of First Amendment protection. *See e. g., First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978).

Our founding forefathers did not guarantee freedom of speech for repulsive obscene purposes. Given the language in the instant case, I must agree with Justice Stevens in *FCC v. Pacifica Foundation, Inc.*, 438 U.S. 726, 746 (1978), when he said:

> These words offend for the same reasons that obscenity offends. Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when he said "such utterances are not

essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly out weighed by the social interest in order and morality." (Citations omitted.)

If the decision were mine alone, I would assess a substantial forfeiture against the licensee. I am advised, however, that the Commission's interpretation of *Pacifica* is so narrow that the language here would not fall within the scope of indecency as presently defined. I am simply astonished that the Commission has placed itself in such an "obscene" legal position.

While my preference would have been to assess a fine, I do believe today's decision takes significant steps to rectify our present situation. It should be abundantly clear that the Commission will no longer confine *Pacifica* to the facts of that case. In addition, we are directing the staff to submit this record to the Justice Department for criminal prosecution under the obscenity provisions for 18 U.S.C. Sec. 1464. This decision, together with the other decisions adopted today, will go a long way in correcting what has become an intolerable situation. Therefore, I concur.

FOOTNOTES

[1] *See , e. g., Pacifica Foundation*, 56 FCC 2d 94, 99 (1975), *aff d sub nom. FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

[2] Nuisance law generally speaks to channeling behavior rather than prohibiting it. While indecent transmissions to adults may not, in and of themselves, be unlawful, indecent transmissions to children are inappropriate. Under the nuisance rationale, channeling indecent broadcasts to times when there is not a reasonable risk that children may be in the audience avoids the inappropriate broadcast of such material to children. *See Pacifica Foundation*, 56 FCC 2d at 98; *see also FCC v. Pacifica Foundation*, 438 U.S. at 749-51.

[3] Our regulation of indecent speech is a valid time, place and manner restriction because our objective is not to proscribe the expression of any particular type of protected speech. Rather, our purpose is to promote the content-neutral and significant governmental interest in safeguarding the well-being of the nation's youth, while preserving the ability of adults to receive the material during the times of day when there is not a reasonable risk that children may be in the audience. *See generally Renton v. Playtime Theatres*, 106 S.Ct. 925 (1986).

[4] *Pacifica Foundation*, 36 FCC 147 (1964); *see also Pacifica Foundation*, 56 FCC 2d 94, 99, 100 (1975).

[5] We are here addressing the risk of children in the audience during the time frame and with regard to the market before us. Of course, indecent material could be broadcast at a time when there is not a reasonable risk that children may be in the audience.

[6] The Commission has been advised that neither a tape recording nor a transcript of the program is available to provide a more detailed review of the words used, the context or the level of repetitiveness.

[7] Accordingly, we do not believe a warning preceding a broadcast program is sufficient to restrict the access of children to indecent material at times of day when there is a reasonable risk that children may be in the audience. Nevertheless, we continue to expect advance warnings to be given when broadcasters choose to air indecent programming at a time when there is not a reasonable risk that children may be in the broadcast audience. See Regents of the University of California (KCSB-FM), FCC Rcd., FCC 87-139, fn.8. (adopted April 16, 1987).

[8] See, e.g., Pacifica Foundation, 36 FCC 147, 149 (1964); see also Pacifica Foundation, 56 FCC 2d 94, 98 (1975).

[9] The Commission has the authority to issue declaratory rulings in order to remove uncertainty in complicated areas of the law such as this, see 5 U.S.C. §554(e), and this Memorandum Opinion and Order is intended to serve as such a ruling. Although this case addresses the particular facts herein, this decision will have precedential effect on other broadcast licensees as well.

[10] If this material is determined to meet the Miller test of obscenity based upon local community standards, the broadcast of such material would be entirely prohibited, regardless of the time of day, since it would not be constitutionally protected speech at any time.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA
Licensee of KCSB-FM,
Santa Barbara, California

MEMORANDUM OPINION AND ORDER

Adopted: April 16, 1987; Released: April 29, 1987

By the Commission:

1. The Commission has before it a complaint with respect to certain programming aired on KCSB-FM, Santa Barbara, California, which allegedly violates Title 18, United States Code, Section 1464. Under Section 503(b)(1)(D) of the Communications Act, the Commission has authority to impose a forfeiture or other sanction upon a licensee which has violated Section 1464. At issue is whether the broadcast constitutes a violation of Section 1464, and if so, what penalties, if any, should be imposed upon the subject licensee for such violations.

2. On or about September 17, 1986, the Commission received complaint alleging that on Saturday, July 26, 1986, during the course of a 9:30 p.m. music program, KCSB-FM broadcast recorded music containing indecent or obscene language. On September 22, 1986, the Chief, Mass Media Bureau sent the Regents of the University of California a letter of inquiry regarding this complaint. The letter specifically asked the licensee to provide any information that might assist the Commission in determining whether the program in question was obscene or indecent. The licensee responded by letter dated October 30, 1986. The materials enclosed with the letter included a copy of the KCSB-FM associate manager's report of an October 14, 1986, internal investigation into this matter. The report concluded that, according to the station's bylaws and training manual, the material broadcast, which consisted of a song entitled "Makin' Bacon," was not obscene but might be considered "profane" (a term apparently intended by the licensee to encompass the legal definition of "indecent"). The report therefore addressed the issue of when children might be listening, an element emphasized by the Supreme Court in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). The report opined that "children would not be listening to the radio at 10 p.m. on a Saturday night [when the subject song was broadcast]," but indicated that in the future such material would air closer to midnight to prevent further accessibility to children.

3. The Commission is empowered to take action with regard to programming proscribed by 18 U.S.C. § 1464.[1] Under the prevailing test, indecent speech is "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs."[2] Such indecent speech is actionable when broadcast "at times of the day when there is a reasonable risk that children may be in the audience."[3] Speech that is indecent must involve more than an isolated use of an offensive word. *See Pacifica Foundation*, 95 FCC 2d 750, 760 (1983). Specific words, however, need not necessarily be repeated to the same degree as were the words involved in *Pacifica*, nor do the seven words at issue in *Pacifica* provide an exhaustive list.[4] Further, what is indecent "is largely a function of context"[5] and cannot be judged in the abstract.

4. Applying these principles, we find that the lyrics of the song "Makin' Bacon" are indecent. The song as broadcast includes the following language:

> Makin' bacon, makin' bacon, makin' bacon, makin' bacon
>
> [Inaudible]
>
> A ten-inch cropper with a varicose vein
>
> Makin' bacon is on my mind
>
> Come here baby, make it quick,
>
> Kneel down there and suck on my dick
>
> Makin' bacon is on my mind
>
> Makin' bacon is on my mind
>
> Turn around baby, let me take you from behind,
>
> Makin' bacon is on my mind.
>
> With your blue, blue knickers, you look so neat,
>
> Bend over baby, gonna give you my meat,
>
> Makin' bacon is on my mind.
>
> Get down baby on your hands and knees
>
> Take my danish and give it a squeeze
>
> Makin' bacon is on my mind
>
> Makin' bacon is on my mind
>
> Turn around baby, let me take you from behind
>
> Makin' bacon is on my mind.
>
> * * *
>
> Hey baby, got something to chew
>
> Deep throat, baby, it's good for you
>
> Makin' bacon is on my mind.
>
> * * *
>
> Makin' bacon is on my mind
>
> Turn around baby, let me take you from behind
>
> Makin' bacon is on my mind.

5. As noted in *Infinity Broadcasting Corp.* and *Pacifica Foundation*, also decided today, prior Commission rulings have applied the *Pacifica* definition of indecency in a manner that requires clarification.[6] We find that this broadcast made several clearly discernible references to sexual organs and activities, and that these references are patently offensive as measured by contemporary community standards for the broadcast medium.[7] In addition, as

we noted in *Infinity*, innuendo can be, and in this case is, rendered explicit by surrounding explicit references that make the meaning of the entire discussion clear. Although the material aired does not involve the specific seven words at issue in the *Pacifica* case, we find that it would be actionable under our clarified definition of indecency set forth today.

6. Similarly, we find that the song was broadcast at a time when there was a reasonable risk that children may have been in the audience. The Commission in the past has indicated that it might be permissible to air programs containing indecent material after 10 p.m. when accompanied by a warning[8] but, as clarified today, no such arbitrary time of day will govern hereafter.[9] Data concerning audience composition must be examined to assess the risk that children may be present. In this context, we note that a significant number of children remain in the Santa Barbara area radio audience during the time here in question according to available audience survey information.[10]

7. In light of the fact that prior rulings may have created uncertainties as to the scope of actionable indecency, we hereby warn The Regents of the University of California and all other broadcast licensees that this material would be actionable under the indecency standard as clarified today.[11] Future violations will be met with the appropriate sanctions.

8. ACCORDINGLY, IT IS ORDERED, That the Mass Media Bureau will send a copy of this Memorandum Opinion and Order to the licensee at its address of record and to the person who filed the complaint relating to the "Makin' Bacon" broadcast.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] *See* 47 U.S.C. §§ 312(a)(6), 312(b), and 503(b)(1)(D).

[2] *See Pacifica Foundation*, 56 FCC 2d 94, 98 (1975), *aff'd sub nom. FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (*Pacifica*). *See also Pacifica Foundation*, FCC Rcd., FCC 87-138 (adopted April 16, 1987).

[3] *Pacifica*, 56 FCC 2d at 98.

[4] *See Pacifica Foundation*, FCC Rcd., FCC 87-138 (adopted April 16, 1987); *Infinity Broadcasting Corporation*, FCC Rcd., FCC 87-139 (adopted April 16, 1987).

[5] *FCC v. Pacifica Foundation*, 438 U.S. at 742.

[6] *See Infinity Broadcasting Corporation*, *supra* n.4; *Pacifica Foundation*, *supra* n.4.

[7] We note that the licensee has provided excerpts from the station's bylaws and training manual stating its belief that pre-recorded song lyrics are somehow immune from Commission action. We wish to take this opportunity to make it clear that song lyrics enjoy no special protection, and those licensees who choose to broadcast songs containing indecent lyrics are subject to the same regulatory standards that are applied to any other utterances made by means of radio communication.

[8] *See, e.g., Pacifica Foundation*, 56 FCC 2d 94, 98-99 (1975); *Pacifica Foundation*, 36 FCC 147, 149 (1964). We note that, although station KCSB-FM broadcast "Makin' Bacon" shortly after 10 p.m., no warning was given beforehand, contrary to prior Commission guidance. *See Pacifica Foundation*, 56 FCC 2d at 99. While a warning is not sufficient to restrict adequately minors' access to indecent material, the Commission will continue to expect advance warnings to be given when broadcasters choose to air indecent programming at a time when there is not a reasonable risk that children may be in the broadcast audience.

[9] *See Pacifica Foundation*, *supra* n. 4.

[10] Available data indicate that approximately 1,200 children between 12 and 17 years of age are still in the radio audience per average quarter hour in the Santa Barbara area between 7 p.m. and midnight on Saturday evenings. There are approximately 4,900 children within this age group within the City of Santa Barbara itself and 27,800 in the county. *Arbitron Ratings-Radio, Santa Barbara*, Fall 1986, Metro Survey Area, Saturday 7:00 P.M. to Midnight, Average Quarter Estimate; 1980 Census of Population, California General Population Characteristics.

[11] The Commission has authority to issue declaratory rulings in order to remove uncertainty in complicated areas of the law such as this, see 5 U.S.C. § 554(e), and this Memorandum Opinion and Order is intended to serve as such a ruling. Although this case addresses the particular facts herein, this decision will have precedential effect on other broadcast licensees as well.

Concurring Statement
of
Commissioner James H. Quello

In the Matter of Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. Section 1464.

I concur in this Report because Congress unequivocally declared that the Commission "shall promulgate regulations...to enforce the provisions of [section 1464] on a 24 hour per day basis."[1]

I agree completely with the Report's conclusion that our interest in helping parents control their childrens' media viewing habits is paramount. The courts have recognized that protecting the physical and psychological well-being of children is a compelling interest. See, e.g., Sable Communications of California, Inc. v. FCC, 109 S. Ct. 2829, 2836 (1989).

Given the vital nature of this interest, it is important to keep in mind that this Report will be subject to immediate judicial scrutiny as the pending litigation regarding the 24 hour ban resumes.[2] Thus far, the courts have never upheld a ban on indecent material for any medium, and have struck down regulations deemed to be excessively burdensome.[3] Perhaps for

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[1]Making Appropriations for the Department of Commerce, Justice, and State, the Judiciary, and Related Agencies for the Fiscal Year Ending September 30, 1989, and for Other Purposes, Pub.L.No. 100-459, Section 608, 102 Stat. 2186, 2228 (1988).

[2]Action for Children's Television v. FCC, No. 88-1916 (D.C. Cir. Sept. 13, 1989) (remanding issue of 24 hour ban to the Commission for "a full and fair hearing on . . . the propriety of indecent broadcasting").

[3]E.g., Sable Communications of California, Inc., 109 S. Ct. at 2836-39; Wilkinson v. Jones, 480 U.S. 926 (1987) (mem.), aff'ing, 800 F.2d 989 (10th Cir. 1986), aff'ing sub nom. Community Television of Utah, Inc. v. Wilkinson, 611 F. Supp. 1099 (D. Utah 1985); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983); Sable Communications of California, Inc. v. Pacific Telephone & Telegraph Co., 890 F.2d 184 (9th Cir. 1989); Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988); Carlin Communications, Inc. v. FCC, 837 F.2d 546 (2d Cir. 1987), cert. denied, 109 S. Ct. 305 (1988) ("Carlin III"); Carlin Communications, Inc. v. FCC, 787 F.2d 846 (2d Cir. 1986) ("Carlin II"); Cruz v. Ferre, 755 F.2d 1415 (11th Cir. 1985); Carlin Communications, Inc. v. FCC, 749 F.2D 113 (2d Cir. 1984)

that reason, we might have gone farther in this Report to obtain empirical evidence of the viewing habits of children 12 and under.

Ever since I came to the Commission some 16 years ago, I unhesitatingly have pointed out the need to enforce our rules against those few licensees who go too far. At times in the past I felt like the only Commissioner who favored this policy. Nevertheless, I think it is important to give credit where it is due to the broadcast industry. Thus, while it may be true, as the Report points out, that theatrical presentations of certain films such as "Deep Throat" or "Debbie Does Dallas" have not been held to be obscene, it is also a fact that there has never been a threat that movies of this type would show up on free over-the-air television. Citing such hard core films, the Report strays far afield from the legitimate concern with broadcast indecency and runs the risk of tarring broadcasters with too broad a brush.[4] No licensee in America has ever aired the type films listed in the Report, and, to my knowledge, no licensee has ever considered doing so. Even on cable television, where courts have found a greater right to transmit such material, operators have steered clear of hard core fare except in a very few instances.[5]

("Carlin I"); Fabulous Associates, Inc. v. Pennsylvania Public Utility Comm'n, 693 F. Supp. 332 (E.D. Pa. 1988).

I think we make a case that broadcasting is a more pervasive medium than those involved in previous cases. However, congressional sponsors of the ban on indecent dial-a-porn legislation stated that "[t]elephones are precisely like radio and television because of their easy accessibility to children and the virtual impossibility for parents to monitor their use," and asked, "[i]s there really a medium more 'pervasive' than the telephone?" 134 Cong. Rec. H1694 (April 19, 1988) (remarks of Rep. Bliley).

[4]As originally drafted, the Report even cited sex magazines, sex manuals and pornographic playing cards as examples of indecent but non-obscene materials. Such examples are irrelevant to broadcasting and wisely have been deleted from the final Report.

[5]While I understand that examples of hard core pornography were identified to illustrate the "broad range of material that ... could be considered indecent," Report of the Commission at para. 21, it would be well for us to remember that this "broad range" encompasses programming of real merit. See, e.g., Hickey, Four Letters Spell Dilemma on TV News, WASHINGTON TIMES, June 29, 1990 at B6 (detailing ways in which television stations modified their news coverage of the Vista Hotel sting operation in the Marion Barry drug and perjury trial).

Indeed, broadcasters have exhibited commendable sensitivity to issues of indecency, as befits their status as public trustees. In this regard, the Board of Directors of the National Association of Broadcasters in June issued a Statement of Principles for radio and television broadcasting. The Statement addressed various areas of programming content in order to "reflect what [the NAB] believes to be the generally-accepted standards of America's radio and television broadcasters." With respect to sexually oriented material, the Statement provided, in relevant part:

> "Programming that purely panders to prurient or morbid interests should be avoided.
>
> Where significant child audiences can be expected, particular care should be exercised when addressing sexual themes.
>
> Obscenity is not constitutionally-protected speech and is at all times unacceptable for broadcast.
>
> All programming decisions should take into account current federal requirements limiting the broadcast of indecent matter."

Although the Statement of Principles is advisory only,[6] such efforts by broadcasters should be recognized and appreciated.

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[6]Unlike the NAB's Television Code, which for thirty years provided broadcasters with guidelines for meeting their statutory obligation to serve the public interest, the Statement of Principles provides no means of enforcement. The NAB unfortunately is barred from doing more by a judicial holding that the Television Code violates antitrust laws. See United States v. National Ass'n. of Broadcasters, 536 F. Supp. 149 (D.D.C. 1982). This decision was a disservice to the American public that I hope will be overturned by congressional action. See, e.g., TV Violence Act, S. 593, which would grant antitrust immunity to allow the industry to adopt voluntary guidelines to help control depictions of violence, sexually explicit material and use of illegal drugs.

Finally, I agree with the Report that adults who wish to view indecent material have access to such programming from other media.[7] But I hesitate to conclude that the other sources are "largely indistinguishable" from, or "functionally equivalent" to broadcasting. Report paras. 84, 87. Such a characterization tends to undermine the public interest standard that makes broadcasting unique. For if we must consider the overall media environment to gauge whether or not the public has adequate access to information, it weakens the rationale for imposing special information obligations on Commission licensees. Suffice it to say that if adults wish to go to the extra trouble of obtaining indecent programming, nothing we do today prevents them from doing so.

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[7]Adult programming is widely available on audio and video cassettes, cable television and in theatres. But as the Commission recently concluded in our report to Congress on cable television, MMDS is currently available to only 300,000 subscribers nationwide and DBS does not yet exist. See Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, MM Dkt. No. 89-600 (adopted July 26, 1990) at paras. 100, 104. Even cable is unavailable to some ten percent of television households, and approximately 43 percent to homes passed do not subscribe. Id. para. 3.

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